

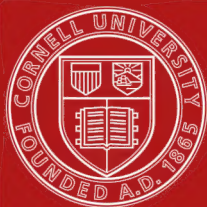
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A TREATISE
ON THE
LAW OF INSURANCE

FIRE, LIFE, ACCIDENT, MARINE

WITH A SELECTION OF LEADING ILLUSTRATIVE CASES

AND
AN APPENDIX OF STATUTES AND FORMS

BY
GEORGE RICHARDS

OF THE NEW YORK BAR AND LECTURER ON INSURANCE LAW
IN THE SCHOOL OF LAW OF COLUMBIA COLLEGE

NEW YORK AND ALBANY
BANKS & BROTHERS, LAW PUBLISHERS

1892

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PREFACE.

THIS book was designed primarily for the class-room, and is the result of an effort to combine the advantages of the two more prominent methods in use for teaching law, commonly known as the text-book and case systems, the comparative merits of which have recently aroused wide-spread and thoughtful attention.

The appearance of Langdell's Select Cases as a substitute for Parsons on Contracts, at Harvard Law School, in the year 1871, and the subsequent abolition of text-books from their curriculum by the law faculty of that great university, marked a conspicuous departure from pre-existing methods of legal instruction, and gave impetus to an exchange of views among those interested in education which has continued with increased earnestness.

By the old method, the student is expected to acquire a knowledge of the elements of the law by memorizing the pages of a general treatise, which, in the estimate and according to the views of its author, contains a compendium of the whole body of law upon the given subject. By the other method, the student is made acquainted with original sources of legal authority; namely, leading decisions and opinions by the courts upon the given subject, together with the precise statement of facts upon which the opinion in each case is based, substantially as recorded in the official reports.

These selected cases, edited, arranged, and printed in a book for this purpose, are put into the hands of the class, and are made the subject not only of study and recitation, but also of a free discussion in the class-room under guidance of an instructor, with a view to evolving, illustrating, and emphasizing the important principles established by them, and also other analogous and closely allied principles which may at the same time be conveniently considered.

The former method gives a synopsis or brief outline of many

cases ; the latter sets forth with exact detail a few selected cases upon leading points illustrative of essential principles. The former method is more synthetic and abstract, the latter more inductive and concrete. The former is more theoretical, and, in a sense, more scientific ; the latter, while embracing a narrower range of decisions, is, with respect to the particular adjudications and principles which it includes, more definite, practical, and thorough. Each of these methods, no doubt, possesses points of superiority over the other ; and either is, in my judgment, for purposes of giving instruction in most branches of jurisprudence and for the average American student at law, immeasurably preferable to a lecture system.

A scientific presentation of a subject in its entirety, by a competent master, must be of value to a student. Within the broad scope of a general treatise, principles can be concisely defined and conveniently arranged, not only for purposes of study in the first instance, but also for subsequent reference and review ; the relations of different cases to one another can be explained, decisions seemingly inconsistent can be harmonized, historical developments can be briefly but adequately summed up, and many particulars and distinctions of greater or less importance, which could not possibly be touched upon within the bounds of any selection of isolated cases, can be enumerated or brought within the reach of general rules.

For example, within pages 133 to 196, inclusive, of this volume, the meaning and legal effect of every clause of the New York standard fire policy are considered with some degree of comprehensiveness, together with numerous citations of authorities. Little of this matter probably could be omitted to advantage ; and yet, to enforce or illustrate all the propositions of the text contained in these sixty-four pages with actual cases reported in full would increase the length of the work to several volumes, making it altogether too bulky and expensive to meet the more immediate aim of the book.

If, then, the student's memory were absolutely infallible, and if extent and variety of legal formulas were the only desideratum, and provided the general treatise were a sufficiently good one, the text-book system might well claim to be without a rival ; and, as it is, it offers, I think, characteristic advantages which nothing else can supersede.

But, on the other hand, it is to be observed, in the first place, that a good text-book upon a given subject is not always available, and especially is this apt to be the case if the branch of law to be considered—like insurance law, for instance—is one which is in process of rapid development. Owing to the large number of independent tribunals in the different States, and the enormous multiplication of reported cases, involving decisions more or less inharmonious with one another, it is a harder task to write a scientific treatise upon a general branch of American jurisprudence than it used to be in former years, when, with a limited field to traverse, the learned juridical author led rather than followed the courts. Accordingly, as is well known, the cautious practitioner of modern times uses his text-book as an index or digest of cases and subjects, rather than as a safe and final exposition of the law, and is seldom satisfied without supplementing its perusal with a resort to the more reliable sources of authority to be found in the reports themselves.

But, in the second place, the solution of the question of ways and means how most effectively to inculcate legal principles may not turn altogether upon the excellence of the text-book that happens to offer itself for use; since at best a text-book is only a reflection from the law, and not the law itself. It is, for the most part, as has been remarked, nothing but a collection of actual decisions from many cases. Here the abridgment is not in the number of cases, but in the form and substance of every one; and in order to bring the reports of all the adjudications cited in the text within the compass of a volume, each case must be condensed to a point almost beyond recognition. Its title and individuality must be sacrificed. The exact and concise statement of material facts, prepared with all the experience and skill of the official reporter, without a careful examination of which no judge or lawyer would venture to estimate or pass upon the validity or significance of the decision, must be seriously curtailed or altogether dropped, for lack of room. For the same reason the opinion of the court, although it may be a monument of legal learning and profound thought, and may offer a most concise model of sound and convincing logic, and although presumably it was deemed necessary for the elucidation of the decision or else it would not have been written, must likewise be omitted.

In place of the statement of facts and the course of reasoning by which the conclusion of the court is explained and supported, the author of the text-book puts into a few words of his own what he considers to be the pith and point of the case; and this is all that is furnished to the student for his edification and instruction. Indeed, without a proper book of selected cases this is all that the instructor *can* furnish to his class, for it would be fruitless to refer them to a reported case without supplying copies of it, and without making it the subject of examination and discussion in the recitation room, since it is evident that a large class cannot all gain access to the same volume in the library on the same day, and experience proves that they would seldom have the inclination to do so if they could.

One difficulty with these summarized transcripts from adjudicated cases, as they appear in the text-book, is that they must be more or less inaccurate as compared with the originals from which they are taken; another conspicuous disadvantage inherent in them is that their meaning is frequently obscured by the mutilation which they have undergone, and especially to the apprehension of a student, for the reason that their abbreviated form presupposes a much greater knowledge of the subject than the ordinary reader possesses; and a third cause for unfavorable criticism is their abstract character as compared with complete reports. An actual, well-established, never-changing case, the full details of which have been made familiar by private study and open discussion, appeals to the imagination and fastens itself upon the memory; but an abstract generalization, read from the pages of some particular edition of a text-book and recited by rote, produces an impression of uncertainty and dissatisfaction, and quickly fades out of remembrance. The student who has gained all his knowledge of law from a perusal of general treatises, when he is subsequently confronted by practical problems in the course of his professional career, will often have a vague recollection that he has read or heard something or other upon the subject presented for his determination, but what the point of the decision was, or which way it went, or where it is to be found, he is unable to remember.

What he wants to acquire from his two or three years in the law school is a legal training of practical utility, and no

course of study is satisfactory that does not meet that requirement; for the practice of the law is an art as well as a science, and its success depends not merely on a knowledge of rules, but still more on the ability to apply them to actual and ever-varying problems of fact. No system of legal instruction can be pronounced perfect that allows a student to wait until after graduation before being required to read any insurance cases, or to see the form of an insurance policy, or the written application for a policy, or the proofs of loss; and yet, a few years ago, that was precisely the experience of many if not most of our law students, although insurance was made one of the required subjects of study, in every course upon contracts.

There are two things, all will agree, in regard to which a law-student ought to make himself an adept before he can hope to become a successful practitioner—he must be able, upon a given statement of facts, to reach a correct legal conclusion, or else he cannot give good advice to his clients; and he must also be able to follow out a sound and logical course of reasoning to its legitimate result, or else he cannot win their cause before court or jury. For teaching these two lessons what better pattern can be devised or conceived of than the leading and well-considered cases of the great jurists who have adorned the bench which constitutes the final source of authority?

Those of us who have had hereditary or long-standing prepossessions in favor of the old and time-honored methods of teaching law, and who are inclined to defend them against a new-comer with feelings of just gratitude and loyalty, must face the question fairly, whether, with all their merits, they are not susceptible of some improvement, and whether the wisest course to adopt is not a resultant of the advantages of both the systems which I have thus attempted to compare and contrast. The actual combinations of fact are so multifarious, legal distinctions are so arbitrary, often having a historical rather than a scientific basis, that it surely must be more profitable for the student to limit his attention at first to fundamental and far-reaching principles, taking time to make these intelligible and familiar by working them out in a realistic way from the great masterpieces of forensic logic and learning given by illustrious judges in the performance of their professional duty, rather than to seek a wider and more indefinite survey of the entire field

of the subject as mapped out by an individual and irresponsible author, of which at best only a faint impression can be permanently retained in the memory.

Finally, it may be objected, that to devote attention to an examination and discussion of actual cases will induce the student to pin his faith to isolated decisions rather than to rely upon general principles, and will encourage in him a habit of superficial disputation at the expense of hard study. However forcible this objection might be if directed against the exclusive use of the case system, it offers no adequate reason for neglecting to take advantage of the undeniable assistance to be derived from a collection of well-selected cases with which to illustrate the more general propositions of the text-book. And the great weight of testimony from those who have tried the experiment certainly favors the further use of selected cases for purposes of debate in the class-room. The collision of mind with mind among the students who take an active part in the argument is stimulating and instructive; and the free and open discussion of principles, based upon definite statements of fact, brings the teacher into more vital and influential relations with his class, and affords him the better opportunity to discover and correct their difficulties and mistakes.

With respect to the law of insurance, the more recent American text-books are, for the most part, elaborate digests of decisions, altogether too voluminous for the class-room. Moreover, much of their space is given up to a consideration of phraseology which does not appear in the later forms of policies, and consequently is more or less obsolete; and no one of them treats specifically of the New York standard fire policy, which is now used exclusively within this State, and has been substantially adopted by several other of the largest States. English text-books on this subject, such as Porter and Bunyon, relate principally to English forms of policies and English statutes and decisions, which differ in important particulars from our own; while no one of the books named treats of marine insurance, although in it, as the oldest branch, the first principles of insurance law were established.

Having lately accepted an invitation from the Faculty of the Columbia Law School to deliver a course of lectures upon the law of insurance generally, including fire, life, accident, and

marine, I find myself reluctantly compelled to prepare and print a book which can with propriety and convenience be put into the hands of the class. In the arrangement of its contents, after tracing the nature of insurance and the origin and growth of insurance and insurance law, I have adopted the method of considering, first, general principles of insurance law by themselves, apart from the terms of the policies, and then the provisions of the policies clause by clause, following the phraseology and the order in which they occur in the several instruments. This, I think, is the most practical and convenient method, both for students and practitioners, and is one which the adoption of a standard form of fire policy has made quite feasible.

The leading cases composing Part Second have been carefully selected from the English and American reports, and are illustrative of the corresponding chapters of Part First, in connection with which they should be studied and discussed.

In the Appendix will be found classified lists of references to the numerous statutes of American legislatures relating to the insurance contract, with a specimen of each class. These lists have been made up from the original statutes of all the States, and are now, for the first time, presented in a text-book on insurance law.

GEORGE RICHARDS.

62 WALL STREET,
March, 1892.

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THE LAW OF INSURANCE.

PART FIRST.

CHAPTER I.

NATURE, ORIGIN, AND GROWTH OF INSURANCE.

§ 1. Nature and Importance of Insurance.—There are certain serious casualties or accidents, such as shipwreck, fires, and premature death or disability, to which exposure is very common among mankind, but which actually occur in comparatively few instances. It is difficult or impossible to predict or prevent the happening of these events, but it is often of the greatest consequence to those most intimately concerned to guard against the loss of property or future earnings which their occurrence entails.

This result may be accomplished by means of a general fund obtained by the imposition of a small contribution or premium upon the many who are exposed to the common hazard, out of which the few who actually suffer may be indemnified.

Insurance is the system for distributing losses of this character in the manner just described. Its principal branches are fire, life (including also accident), and marine insurance; and, as an institution, the development of these branches of insurance among civilized peoples of modern times has assumed a vast and increasing importance. It is not necessary to recite many statistics in illustration of this fact. A very few will suffice.

For assistance in the preparation of this chapter I am indebted to D. A. Home Ins. Co., and to Sheppard Homans, Esq., Pres. of Provident Heald, Esq., Ex-Pres. of Nat. Board Savings Life Asso., and to MacArthur of Fire Underwriters and Pres. of on Mar. Ins., and the Enc. Brit.

For the last year, in this country alone, it is estimated that the value of outstanding risks carried by insurers against fire amounted to more than \$12,000,000,000, and that the payment of premiums for life insurance for the same year nearly reached the sum of \$200,000,000; while the loss by fire during the same period, of property insured and uninsured, is estimated to have exceeded \$120,000,000. To the sufferers by the great Chicago fire of 1871, the fire companies paid over \$90,000,000, by aid of which that city was enabled within a few months to regain its commercial activity and preëminence among the cities of the West.

Fire insurance concerns a larger number of persons probably than any other branch of insurance; but, on the other hand, many persons who have made no great accumulations of capital insure their lives in large amounts. Marine insurance, from its nature, is somewhat restricted and localized as compared with the other departments, and both the business and the practice of the law of this branch of insurance fall into the hands of specialists to a greater extent than in the case of other classes of insurance.

There are certain minor forms of insurance which do not fall within the scope of this book, as, for example, against lightning, tornadoes, hail-storms, boiler explosions, injuries to plate glass, defaults or breaches of trust on the part of officers, trustees, agents, or employees, defects in real estate titles, death to live-stock, and to indemnify merchants for loss from giving credit.

Insurance against accident to the body or health of persons may be considered a branch of life insurance, and subject to the same principles of law.

§ 2. Conditions Necessary.—The conditions which in general are necessary to the successful operation of a system of insurance are said to be these: There must be a risk of real loss which it ought to be beyond the power of either the insurer or the insured to avert or to hasten; a large number of persons must be liable to the like risk; the casualty contemplated must be likely to fall on a comparatively small number of the persons exposed to the risk of it; the probabilities of its occurrence must be capable of being estimated beforehand with

some approximation to certainty; the loss apprehended must be so considerable when it does occur as to be worth providing against; and the cost of that provision must be comparatively so small as not to be prohibitive.

To this list of requisites may be added an honest administration, and some means of securing permanency and integrity to the general fund.

§ 3. Insurance Companies.—The bulk of the business of insurance is now transacted by corporations, which, on account of their exemption from liability to natural death, and their facility for raising capital and extending their operations over wide areas of territory, are peculiarly well adapted to serve in the capacity of insurers. But a not inconsiderable fraction of life insurance business is in the hands of friendly organizations and benefit societies, guilds, orders, odd fellows, knights, and unions, of one sort or another, many of which are incorporated, and some of which are not. The members of these organizations are governed by their by-laws and other regulations, as well as by the statutes and common law of the land.¹

In this country insurance corporations are usually organized under general laws instead of special charters, and are divided into stock, mutual, and mixed companies. A stock or proprietary company has for its basis a capital stock, owned by stockholders, who may be quite distinct from the insured. It ordinarily insures at lower premium rates than those of mixed or mutual companies, and its profits over and above required accumulations and the liabilities of the company are divided in the shape of dividends among the stockholders. In mutual companies there are no stockholders, but the insured themselves are the members of the company, entitled to the management of its affairs and to the receipt of any share of surplus premiums over and above those needed for the payment of losses and expenses. Mixed companies partake of the nature of stock and mutual companies, and in them a certain portion of the profits is paid to the stockholders, and the remainder distributed among the insured. Premiums in most companies are paid in

¹ *Treadway v. Hamilton Mutual Ins. ship Ins. Asso. v. Wyllie*, L. R., 22 Q. Co., 29 Conn. 68. *Great Brit. Steam- B. D. 710* (1889).

cash in advance at stated intervals, but in other companies by means of assessments levied from time to time upon the insured of a certain class to meet the losses which have occurred in that class; and the company is bound in good faith to lay an assessment by which it may meet a loss in accordance with the spirit of its contract.¹ In mutual companies premiums are often paid in whole or in part by notes of the insured, which are held by the company, and from time to time assessed to pay losses and expenses. Premium notes are sometimes made a lien on the property insured. Life companies frequently offer to make loans to the insured, taking the contract of insurance as collateral.

In this country the mutual plan has been much more successful in marine and life insurance than in fire.

In the United States, as a general thing, in the laws governing the organization and scope of insurance corporations, the business of ocean-marine, fire, and life insurance, respectively, is kept somewhat distinct and exclusive; in New York and elsewhere life companies are forbidden to take marine or fire risks, but fire insurance companies are often organized to insure against inland marine disasters, lightning, and tornadoes. In the West, fire losses to crops, whether standing or cut, are an important item.

§ 4. Statutory Safeguards.—For the better protection of the insured, it has been customary throughout the States of this Union, as well as in England, to establish by law an insurance department, or superintendent or commissioner of insurance, or other official, with whom, as a rule, foreign insurance companies doing business within the State, and domestic life insurance companies, with certain exceptions, are required, upon organization or commencement of business within the State, to make deposits of money or equivalent securities, which are held as collateral by the department for the security of the insured. This official, called by different names in different States, has considerable discretionary power to decide whether under the laws of the State a foreign company is entitled to be admitted to transact business within the State.²

The insurance department receives stated reports from each

¹ *Lawler v. Murphy*, 58 Conn. 294 (1890), by Seymour, J.

² *Am. Casualty Co. v. Tyler*, 60 Conn. 448 (1891), by Andrews, C. J.

company, setting forth with some detail its business affairs and financial condition, including its assets and debts, amount of insurance, and other particulars. It also has a visitorial power over the companies, to see that their investments are made according to law, and to examine their books and papers in case of suspected misconduct or insolvency.

In addition to these safeguards, there are laws requiring the companies, before paying out dividends or profits; to accumulate and reserve a certain amount of assets with which to meet any future liabilities; also, laws directing foreign companies to appoint a representative within the State upon whom service of papers can be made.

The object of insurance is to compensate the insured for loss and not to prevent the occurrence of loss; but in many of the cities the fire insurance companies have established a system of patrol with statutory powers, which does much to prevent the spread of fire, and to protect from unnecessary injury or theft the property exposed during and after the conflagration.

Any State has the right to control the conduct of insurance business by the enactment of suitable statutory regulations. It may make a compliance with these by a foreign company the condition of doing business within the State, or it may capriciously shut its doors to a foreign corporation without any reason at all.¹ Subject to such statutes, many of the insurance companies transact business throughout the country generally.

§ 5. Origin of Insurance and Insurance Law.—

The origin of the business of insuring or underwriting is a matter of doubt. The practice of marine underwriting by individuals lays claim to great antiquity. Some suppose it to have existed under the early Roman emperors. But it is more probable that it was started in connection with the revival of commerce which took place in the twelfth or thirteenth century after Christ, especially among the flourishing republics of Italy. At that time the ocean commerce of Christendom was largely undertaken by merchants of the north of Italy, then generally known by the name of Lombards, who had established trading companies in almost every country in Europe.

¹ Doyle v. Continental Ins. Co., 94 119 U. S. 110. Barron v. Burnside, U. S. 535. Phil. Fire Asso. v. N. Y., 121 U. S. 186.

The Lombards appear to have carried the practice of marine insurance wherever they had mercantile dealings, and thus to have gained for it a footing in most of the great European centers of maritime trade. The name of the insurance contract, called a "policy," is of Italian derivation.

It is said that a "chamber of assurance" was established in the city of Bruges as early as A. D. 1310, with various regulations for the government of the insurers and the insured. A form of policy, supposed to be the oldest extant, is given in the note, the original of which is in the Italian language, and was established by the statute of Florence, January 28, 1523.¹

"Be it known and made manifest to all persons, that _____ of _____ makes assurance on

_____, merchandise belonging to him or his friends or to whomsoever the same may belong, laden or to be laden for [such or such a port or roadstead in such a place] by the hands of

_____, or his agent, or although others have laden it in the name of the aforesaid _____, or in some other name designated or not designated on board the ship named

_____, or howsoever named, commanded by _____.

We begin the said insurance from the time when the said goods shall be, or shall have been, laden on board the said ship in [such a place], to continue until the said merchandise shall be discharged on land or in safety at [such a place], with liberty for the ship to touch at any other place, and to navigate forwards or backwards, to the right hand or the left, at the pleasure of the captain, and as he may require: The said assurers taking upon themselves in respect of the said goods the risk of all perils of the seas, fire, jettison, reprisals, robbery by friend or foe, and every other chance, peril, misfortune, disaster, hindrance, misadventure, though such as could not be imagined or supposed to have occurred, or be likely to occur, to the said goods, and barratry by the

master, except as to stowage or custom-house. All the said risks the said insurers are to run and take on themselves until the said goods shall be safely discharged on shore at [such a place]; and if they are not laden, the insurers are entitled to retain one and a half per cent.

"And if the said goods shall sustain, or have sustained, any disaster (which God forbid), the insurers shall pay to the said _____ the sum insured, within two months from the news reaching the city.

"And if within six months there shall have been no true news, the insurers shall pay to the said _____ the sum insured; and in case of subsequent arrival and safe discharge at the said place, the aforesaid shall pay back to each the sum he has received. In the event of shipwreck, it is allowed to make recovery without authority from the insurers, it being stipulated that the said insurers are not responsible for theft by the captain of the said ship.

"And the insurers are bound first to pay to the aforesaid the sums insured, and to litigate afterwards. And these are to bind themselves by sufficient sureties (one or more as directed by the fire official deputies on insurance) to pay back to each insurer the sums they have received, with damages of twenty per cent. The time allowed to

The provision of this policy, that, if the insurers wished to contest the question of their liability, they must pay first and litigate afterwards, is worthy of notice.

At the initial stage of its existence, the contract of insurance was underwritten by individuals and was regulated by mercantile custom, which became the foundation of all the laws and codes subsequently enacted upon the subject.

A recorded mention of insurance in England in 1548 indicates that the practice of insuring had been in vogue there for some time, and somewhat later, on opening Queen Elizabeth's first parliament, Lord Bacon said: "Doth not the wise merchant in every adventure of danger give part to have the rest assured?" But for many years after its introduction into that country, the law of insurance was unknown to the courts of Westminster, and insurance disputes were as a rule settled by the arbitration of mercantile men.

The first reported insurance case belongs to the year 1589, and is mentioned by Sir Edward Coke,¹ in which it was held, "where as well the contract as the performance of it is wholly made or to be done beyond sea, it is not triable by our law, but if the promise be made in England it shall be tried."

In 1601, to provide for the growing practice of resorting to litigation, a special tribunal for the trial of marine insurance cases was established in England,² of which the recital was as follows:

"Whereas it ever hath bene the policie of this realme by all good means to comforte and encourage the merchante, therebie to advance and increase the generall wealth of the realme, her Majestie's customes, and the Strength of Shippinge, which Consideracion is nowe the more requisite because trade and traffique is not at this present soe open as at other tymes it hath bene. And, whereas it hath bene *tyme out of mynde* an usage among the merchantes, both of this realme and of forraine nacyons, when they make any

the insurers for proving is eighteen months.

"To the observance of this the insurers bind themselves to the said , themselves, their heirs, and goods present and future, submitting themselves to the office aforesaid, and

to every other judgment and court, whither the said shall please to summon them."

¹ Dowdale's case, Coke's Reports, part 6, p. 47b.

² 43 Eliz. c. 12.

great adventure (especiallie into remote parts), to give some Consideracion of money to other persons (*which commonlie are in no small number*), to have from them assurance made for their goodes, merchandize, ships and things adventured, or some parts thereof, at such rates and in such sorte as the parties assurers and the parties assured can agree, which course of dealinge is commonlie termed a policie of assurance, &c."

This informal tribunal—which consisted of the Judge of the Admiralty, the Recorder of London, two doctors of the civil law, two common lawyers, and eight grave and discreet merchants, or any five of them—died a natural death within a century after its organization, and by degrees insurance disputes began to come within the jurisdiction of the common law courts of England.

In 1756 Lord Mansfield was appointed Chief Justice of the Court of Queen's Bench, and during his illustrious career he was conspicuous in making the policy of insurance the subject of careful study. From the old sea laws, the foreign ordinances, the writings of jurists, and the usages of trade, he drew and shaped those principles which formed the nucleus of the present system of insurance law.

§ 6. Lloyd's and Lloyd's Usages.—The body of rules or trade customs under which the business of insurance had grown up was known as "the usages of Lloyd's." To these usages and the earlier maritime customs we must look to find an origin for such far-reaching and significant principles of insurance law as the following: namely, that the contract is one *uberrimæ fidei*, demanding a disclosure of all material facts affecting the risk; that personal acts of the insured himself which materially change and enhance the risk during the pendency of the policy will avoid the contract; that there must be no deviation under a marine policy from the usual voyage as prescribed by custom; that the vessel must be seaworthy at the commencement of the risk in a voyage policy; that goods stowed on deck are not protected by the policy in the absence of a general trade usage to the contrary; and that expenditures and, if successful, intentional sacrifices of ship or cargo, made by the master of the ship for the benefit of all

interests exposed to some extreme and impending peril, must be made the subject of general average or contribution from all such interests, whether ship, cargo, or freight.

Lloyd's was originally a coffee-house in London, a celebrated resort for seafaring men and those who were engaged in maritime business. It was started in the latter part of the seventeenth century, at a time when the coffee-houses of that metropolis were the fashionable centers for mercantile or social intercourse. An advertisement in the London "Gazette" of February 18 to 21, 1688, concerning a supposed theft "by a middle-sized man with pockholes in his face," indicates that Lloyd's coffee-house was then located in Tower Street. But within three or four years from that date, the establishment was removed from Tower Street to the corner of Lombard Street and Abchurch Lane, where it became the world-renowned center for commercial intelligence and for the business of marine underwriting. After several other removals, it ultimately took possession of its apartments in the new Royal Exchange.

In 1696 the proprietor started a shipping and commercial newspaper, called "Lloyd's News;" the issue of which was afterwards suspended because the editor was guilty of printing some very harmless information about the proceedings in the House of Lords, but it was revived in 1726 in a greatly improved form under the name of "Lloyd's Lists."

In 1769, in order to put a stop to the illegitimate transactions which occasionally took place within their circle, the principal merchants and underwriters frequenting the coffee-houses formed themselves into a society under fixed rules.

In 1779 the society adopted for exclusive use a definite form of policy thenceforward known as "Lloyd's Policy," which is the basis of the policies now in use in the United States, and which corresponds with the present Lloyd's policy, except that the words "Be it known that" have been substituted for the opening asseveration "In the Name of God, Amen," which appeared in the earlier form, this change having been effected in the year 1850. Though Mr. Justice Buller characterized the instrument as "absurd and incoherent,"¹ it possesses the merit of having had all its clauses explained by

¹ Brough v. Whitmore, 4 T. R. 206.

many legal decisions.¹ In its stability it is in striking contrast with the fire policy, which during its history has exhibited a series of shifting forms, which have given rise to much confusion and uncertainty both in the business and in the law of insurance. As the courts from time to time have adjudicated away by a strict construction the restrictions and exemptions from liability named in the fire policy, its phraseology has been altered by the insertion of a more and more explicit wording in favor of the insurers, until in many instances the legislatures of the several States have been provoked to interference by sweeping statutory enactments which govern the contents and legal effect of the fire insurance contract within those States.² Classified references to these statutes are given in the appendix.

One of the clauses of Lloyd's policy is as follows: "And it is agreed by us the insurers that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London," which shows that, although at the time when this form was drafted, the connection between Lloyd's and Lombard Street had long been severed, the memory was still preserved.

It was from early times the custom at Lloyd's rooms to pass around the proposed policy of the applicant among the members, and each member underwrote or subscribed his name for such portion of the required amount as he wished to undertake, together with the date of subscription, until in this way, by successive subscriptions by different persons on the same policy, the desired amount was covered.

In 1871 the Society of Lloyd's was incorporated by special act of Parliament (34 Vict. c. xxi.), one of the express objects of incorporation being the "collection, publication, and diffusion of intelligence and information with respect to shipping." In the accomplishment of this object it has attained an unrivaled standard of perfection. Lloyd's members have developed a system of agency radiating everywhere throughout the maritime world, by which they are enabled to receive the promptest and most reliable information of all departures from and arrivals at their ports, as well as of losses, casualties, and other useful shipping news.

¹ *Simond v. Boydell*, Doug. 268.

² *Reilly v. Ins. Co.*, 48 Wis. 456.

"Lloyd's Lists" contain reports of mercantile intelligence of this character, which is classified and posted on different colored slips of paper for the benefit of members and subscribers, and afterwards carefully sifted and recorded.

The "black book" contains a record of some 3,000 casualties per year, and the telegraph room is known as the "chamber of horrors."

When a ship is "posted" at Lloyd's "as missing," the recognized time has come to make claim upon the insurers for the loss.

"Lloyd's Captains' Register" is a biographical dictionary of all of the certified commanders of the British mercantile marine.

"Lloyd's Register of British and Foreign Shipping," published annually, gives full details of every British ship, respecting its ownership, construction, tonnage, and rating. Its symbol "A 1" for the highest class of wooden vessels has passed into popular usage; "100 A 1" means the highest class of iron vessels.

A standard London periodical has recently said: "Towering head and shoulders above the crowd of institutions that have helped to win for England the maritime supremacy of the world, stands the corporation of Lloyds. Its collapse would be more widely felt than that of any other commercial institution in the world."

§ 7. Largest American Marine Company.—Both absolutely and in relation to the other principal classes of insurance, ocean-marine insurance occupies a position of greater importance in England than in America. In the volume of its business the foremost marine company in the United States, second perhaps not even to British Lloyd's, is the Atlantic Mutual of New York.

§ 8. Fire Insurance.—Fire insurance as an organized system has had an origin comparatively recent, and it was not until after the great London fire of 1666 that it took any very practical shape, though back in Anglo-Saxon times there is evidence of attempts among friendly guilds to guarantee protection against fire and other calamities by mutual contribution. In 1681 the first regular office for insuring against loss by fire

was opened by a combination of persons at the rear of the Royal Exchange, and in 1710 the Sun Fire Office, the earliest mutual and stock company, was organized in London.

The first fire company established in the United States was "The Philadelphia Contributionship for Insuring Houses from Loss by Fire," incorporated on the mutual plan in 1752, one of its early directors having been Benjamin Franklin. In the extent of risks undertaken, the largest fire companies in the world are the Royal, and The Liverpool & London & Globe, both incorporated in England, but having important branches in this country.

Of the American companies, the Home, of New York, and the *Ætna*, of Hartford, stand at the head. It is said that to the enterprising city of Hartford belongs the credit of giving vitality to the agency system throughout the United States, and of exhibiting a larger investment of capital in insurance stock, in proportion to its size, than any other city in the country is able to show.

§ 9. Life Insurance.—The earliest practical embodiment in the direction of life insurance was the foundation in 1706 by royal charter in Great Britain of "The Amicable Society for a Perpetual Assurance Office." The scheme was simply to raise a fixed contribution from each member, and from the proceeds to distribute a certain sum each year among the representatives of those who had died during the year. No one was to be admitted under the age of twelve, nor above the age of fifty-five, but all were to pay the same rate of contribution.

In 1734 the Society made arrangements for guaranteeing that the dividend for each deceased member should not be less than £100, which was the first approach to an assurance of a definite sum at death, whenever that might occur.

The Equitable Assurance Society of London, which was organized under a deed of settlement and commenced business in 1762, may be regarded as the pioneer of the modern system of life insurance. It issued policies for the assurance of fixed sums on single or joint lives, or on survivorships, and for any term. The premiums were regulated according to age. Lives were admitted with due regard to their state of health and other circumstances.

The creation of corporations in America with power to insure lives and grant annuities dates back beyond the Revolution, one of the earliest companies being chartered in the colony of Pennsylvania as early as 1769, for the benefit of the families of Presbyterian clergymen. But the business of life insurance did not assume much importance until within a period of less than fifty years. The first reported life insurance case in the United States¹ shows the existence of a contract of life insurance as early as 1809. It was in that case contended by the defendant that no valid contract of life insurance could be made within the State of Massachusetts, inasmuch as the law of England in that regard, it was said, had never been adopted in this country; but the court sustained the contract on the ground that it was not repugnant to the general policy of the law or to good morals, and that no reason had been given for condemning such contracts, except by the French Courts which considered "that it is indecorous to set a price upon the life of a freeman which is above all price"—a reason which was pronounced insufficient, specially as coming from France, "where," Chief Justice Parker remarked, "freedom had never been known."

Accident insurance, which is a branch of life insurance, is a development of later growth. Ordinary life insurance protects against the pecuniary loss arising to a man's family, or creditors, or others, by his death, whether that is caused by old age, accident, or disease. But accident insurance protects only against losses caused by accident, whether resulting in death or not.

An important company was established in London in 1849 for insuring against the consequence of railway accidents—The Railway Passengers Assurance Company. In 1856 its business was extended to embrace accidents of all kinds. The companies carrying the most extensive accident risks in the United States, and probably in the world, are the Travellers, of Hartford, and the Mutual Accident Association of New York City.

In the United States, life insurance has attained a greater relative importance among financial institutions than in any other country. During the years which immediately followed the close of the civil war, it grew with unparalleled rapidity; new companies were established in great numbers; new features of

¹ Lord v. Dall, 12 Mass. 115.

insurance contracts were devised, and soliciting agents canvassed the country from one end to the other. In the magnitude of its transactions, no life insurance company in the world is able to make comparison either with the Mutual or the Equitable, or the New York Life Insurance Company, all three of New York City. Each one of these colossal institutions exhibits an annual statement of assets greatly in excess of \$100,000,000. It is to be observed that fire policies on the average are for a much shorter term than life policies, and that a life company is ordinarily obliged to accumulate for the payment of future losses a much larger amount of assets than is required in the conduct of the business of marine or fire insurance.

§ 10. Real Estate Title Insurance.—Passing notice must be given to a class of corporations which have of late years been organized in many large cities in the United States to insure real estate titles, and which generally unite with title insurance an extensive and rapidly increasing business of searching titles. Their policies obligate the insurers, in substance, to do three things for the protection of the insured: (1) to defend suits against the title at the expense of the insurers; (2) to pay judgments rendered; (3) and if the insured contracts to sell or loan, and the title is refused, to test its validity in court at the expense of the insurers, and if defeated to pay damages and also to take the property where the insured has contracted to sell it.

Of this class of corporations the Real Estate Title Insurance and Trust Company of Philadelphia, organized in 1876, was the pioneer. The Title Guarantee & Trust Company of New York City, incorporated in 1882, does an immense business in guaranteeing titles; and the Lawyers' Title Insurance Company of New York City is also an important company, though it gives precedence to its department for searching titles. The facilities of such permanent organizations for utilizing, arranging, and recording the past results of their extensive and multiplied examinations of titles are so great that it is becoming more and more difficult for individual attorneys to compete with their prices in this branch of legal work.

§ 11. Classification of Risks.—In fire and marine insurance, risks are classified according to the degree of hazard,

and the premiums graded accordingly. But in life insurance, as a rule, only healthy persons are accepted, and consequently the premiums are scaled according to age; sometimes, however, special risks are taken involving a hazardous occupation, or an unhealthy location of residence, for which an extra premium is paid. In all branches of insurance the amount of the premium is made to depend more or less upon average results which have been arrived at after elaborate observations and careful collection of statistics bearing upon the subject.

In accepting or rejecting a proposed risk, the insurers are governed by their familiarity with these general laws of average. But it is also very important for them to gain a thorough acquaintance with the facts and circumstances relating to the particular case, to ascertain whether it falls within or outside the general law. The location; the inherent nature and condition of the subject-matter; the character of the insured for honesty or dishonesty, negligence or prudence; the peculiar temptations to him in consequence of business embarrassment or over-insurance to cause the event insured against or be careless in preventing it—all these considerations are influential in inducing the insurers to accept or decline the proposal, or to accept it only at a special rate of premium. In life insurance the company desires to know the age of the applicant, his occupation, residence, probable area of travel, his health present and past, and also the healthfulness and longevity of his parents and nearest relatives. An examination made by the company's medical examiner discloses with some degree of accuracy the condition of present health, but the other information is derived largely from the applicant himself, who is required to answer a series of printed questions detailed in a paper called an application, which he is required to sign. In fire insurance the company generally desires to know—according to the subject-matter of the proposed insurance, whether dwelling-house, barn, store, factory, theater, church, railway cars, etc., or their contents—the location; the materials and structure, whether wood, stone, brick, or iron; whether the roof is slate, tin, tar, or shingles; the condition of flues and chimneys; whether the building is fire-proof or not; its relations and communications with adjoining premises; whether it has iron shutters and iron doors; the inflammability of personal property; the character of the use

and occupation of the premises and surroundings, whether unoccupied or subject to careful supervision; the facilities for extinguishing fire; the efficiency of the fire department, and many other particulars from which they may determine whether the risk is a good one, or whether it is hazardous, extra hazardous, specially hazardous, or undesirable at any price.

Formerly much of this information was obtained from the insured by means of the written application containing such interrogatories as were appropriate to give the desired facts. But now the use of a formal application is for the most part confined to Western farm property. In the East, and especially in the cities, the insurers have come to rely very much upon their own means of examination; and for use in the larger cities they have prepared careful insurance maps showing the character of the risk involved in every building.

In marine insurance the rating of ships and statistics regarding them are to a considerable extent a matter of record, but more or less information is often required by the insurers from the insured in relation to the proposed risk. They must be advised from some source of the ownership, quality, and nationality of the vessel, the course of the proposed voyage, the character of the captain, the nature of the commodity carried, the state of political relations, and in time of war whether the ship is to sail with convoy.

In marine insurance the scale of premiums varies very greatly according to circumstances, and may sometimes well nigh equal the value of the insured property. The subject of insurance is sometimes insured "lost or not lost," provided neither party knows whether the risk has already terminated.

§ 12. Mortuary Tables.—The premiums to be charged for life policies are based upon calculations made from mortality tables, which are tabulated exhibits of the number of survivors and the number of those dying each subsequent year among a given number of persons taken at various given ages respectively. A considerable number of such tables have been prepared at different times, the earliest of which are so rough and inaccurate that they possess only a historical interest. Of the more reliable tables which have been in use in recent times

may be mentioned the Northampton Table, which was constructed by Dr. Thomas Price from the registers kept in the parish of All Saints, Northampton, England, for the forty-six years, 1735 to 1780. Another English table very extensively used by insurance companies was the Carlisle Table, constructed by Mr. Joshua Milne from materials furnished by the labors of Dr. John Heysham. These materials comprised two enumerations from the population of the parishes of Saint Mary and Saint Cuthbert Carlisle in 1780 and 1787, and the abridged bills of mortality of those two parishes for the nine years 1779 to 1787.

Since then many mortuary tables have been prepared in England and the United States, based upon much more carefully collected statistics and giving more accurate results. The mathematics of the business, of great practical consequence, are managed by actuaries. New York and other States have adopted the American Experience Table, with four and a half per cent. interest; while Massachusetts, Connecticut, and other States use the Actuaries or Combined Experience Table, with four per cent. interest; but in New York the liabilities of the life companies are now valued by both standards. A net premium is the rate at which, according to the table of mortality and interest, an insurance could be effected. But to this must be added in practice an important percentage which is called "loading," or "margin," in order to defray the expenses of the business, and to provide for a possible excess of mortality. A gross or office premium is the net premium increased by the loading.

§ 13. Reserve.—That portion of the premiums of a policy with the interest thereon which is required to be reserved or set aside as a fund for the payment of the policy when it becomes due is called the "reserve." The mean or average duration of the life of an individual after any specified age, according to a given table of mortality, is called the "expectation of life." Statistical observations on the duration of human life point to the conclusion that, after the period of extreme youth is passed, the death rate among any given body of persons increases gradually with advancing age; and where the annual premium is fixed at a uniform rate during the life

of the policy, as is customary in life insurance, it is evident that if the policy is surrendered by the insured before its expiration, the insurers can generally afford to make a return of a portion of the premiums which have been paid. Of the reserve value which the policy is estimated to have at the time of surrender, a part called "the surrender value," the company offers to pay to the insured in return for the cancellation of the policy before its natural expiration.

From these same considerations it appears, also, that in the event of the insolvency and winding up of a life insurance company, there is a basis for calculating the present value of the unexpired policies, by which an equitable distribution of assets may be made to all the policy holders in accordance with the laws of priority.

The test of solvency is the rule which the insurance department is required to apply to determine the ability of a company to pay all losses which, according to the standard table of mortality and rate of interest, may occur. The liabilities of a company consist of its actual unpaid losses, its expenses and contingent obligations, for the payment of which its assets are held liable. The whole amount insured is really a contingent obligation, but in testing the present solvency of a company, this is regarded as a liability only to the extent of the reserve on each policy.

§ 14. Different Kinds of Policies.—The forms of printed policies of insurance in use are varied and numerous. They are filled up in writing to suit each particular case, and are often further modified by special clauses, which may be pasted or attached in the shape of printed riders to the more general form.

A valued policy is one which expresses on its face an agreement that the subject of insurance shall be valued at a specified sum; for example, a policy upon "the ship *Argus*, valued at \$10,000." Policies upon lives are almost invariably valued. Policies upon ships are generally valued, but other kinds of policies not so universally. Certain States have valued policy laws, but these are not to be commended, because they impose too arbitrary a standard, and may be used as an instrument of fraud.

An open policy is one in which the value of the thing insured is not agreed upon in the policy, but is left to be ascertained in case of loss ; for example, a policy upon a house for \$10,000. The term "open policy" or "running policy" is also employed to indicate a very general form of insurance frequently used where the insured is likely to effect many successive insurances from the same company. It covers such goods, at such amounts of insurance, in such storehouses and places, or, if a marine policy, in such ships, and at such rates of premiums, as from time to time shall be agreed upon and indorsed on the policy or in a book attached thereto, the purpose being to obviate the necessity of executing a fresh policy for every transaction.

A floating policy is also a general form of insurance, but usually upon goods belonging to the insured within a certain specified area of territory, or otherwise designated, and is intended to cover property which cannot well be described specifically because of its fluctuating quantity and location ; as, for example, merchandise in freight trains, warehouses, or lighters. The amount of goods covered by such a policy is ascertainable at the moment of loss only ; and if at the time of loss the amount of goods at the place of the fire exceeds the amount of insurance, it is generally provided, that, for the excess, the owner must be his own insurer, and share the loss *pro rata* with the insurer. The terms "open policy," "floating policy," and "blanket policy," are sometimes used indiscriminately.

A time policy is one in which the duration of the risk is defined at the beginning and at the end, by a fixed date ; as, for example, from noon of January 1, 1892, until noon of January 1, 1893.

A voyage policy is one in which, irrespective of time, the duration of the risk is established by geographical termini ; as, for example, from New York to Liverpool, or from New York to Chicago.

A life policy is one payable on the death of the person insured. A term policy is one taken for a limited number of years, the sum insured being payable only in case of the death of the insured during this period. A joint-life policy is one payable on the earliest death of either of two or more persons

insured. A survivorship policy is one payable on the death of the survivor of two or more persons.

An endowment policy is one which is payable when the insured reaches a given age, or upon his decease if that occurs sooner. A tontine policy is one in which it is agreed that certain profits of the business shall be apportioned among those of the insured of a certain class surviving, at certain intervals; for example, every ten, fifteen, or twenty years. The lapsed policies of the class forfeit their reserve and dividends to the survivors. A tontine dividend is the distribution of such profits among the survivors who are entitled to it after the given period. A semi-tontine policy is one in which it is agreed that the dividends only shall be apportioned among the survivors of the class.

In the case of a mutual company or benefit society, the policy or certificate is at once evidence of the contract and of the fact of membership, and generally refers to the by-laws and conditions subject to which it is received by the insured. A specimen of the form of a certificate of a benefit society, and of its by-laws and rules, will be found in one of the late Connecticut cases already cited.¹

§ 15. Reinsurance.—A feature of insurance business which has developed into great magnitude is the practice of reinsurance. Where a company finds itself in embarrassed circumstances, or for any reason desires to limit its liability, in certain classes of risks, or in certain localities, or under a particular policy, it secures, if possible, policies of reinsurance from other companies. The entire business of an insurance company is not infrequently absorbed in this way by some stronger competitor.

§ 16. Authority of Insurance Agents to Bind the Companies.—At least some general understanding of the agency system employed by insurance companies in the United States is a prerequisite to the intelligent consideration of the numerous legal questions to which it gives rise, and which, especially under the doctrine of waiver and estoppel, assume a peculiar importance in the law of fire and life insurance.

¹ Lawler v. Murphy, 58 Conn. 294 (1890).

The phraseology used by the companies or current in the trade to describe an insurance agent is of little significance in the law. The significant fact to be ascertained is this, namely, the real scope of the authority which has been granted to him as defined by the requirements of the act or the business which he has been employed by the company to do for it. Within the jurisdiction of many courts this fact is deemed more controlling over the contract rights of the parties than any general stipulation regarding the limit of the agent's authority contained in the printed policy, because the policy in any event is not the best evidence of relations existing between the insurance company and the persons employed by it; and, moreover, the terms of the policy are often settled by the agent himself, who cannot by his own acts fix the extent of his powers; and, finally, the contract is frequently closed and the premium paid before the company executes and delivers the policy.

The practice of different companies is so varied, and the authority given to the particular agent not only by his written commission but also perhaps by an extended correspondence between himself and his superiors, or by a course of usage recognized by the company, is often so ill-defined, that any brief classification must be regarded as rough and only approximately correct. In view of this consideration it is clear that the facts of every case as it arises must receive careful attention. In this country the boards of directors of insurance companies do not as a rule take an active part in the management of the details of making, altering, cancelling, or renewing policies of insurance, or in adjusting losses, or in instructing or superintending the cohort of agents who are located outside of the home office. Consequently such duties and powers, subject to the laws of the land and to charter and by-law restrictions, must become vested in the officers. Of the officers, the president and secretary more particularly are in most companies considered amply empowered with wide discretions in this regard, and are most frequently designated by the rules of the company as the proper officials to sign the policies of insurance.

§ 17. Agents of Life Companies.—Agents of American life companies located outside the home office may for our present purpose be divided into two classes—general agents so

styled by the craft, and sub-agents. The first class are so called because they have the power to select and make contracts with sub-agents. General agents are employed by the company, and hold a contract from the home office authorizing them to canvass for insurance. They periodically account to it for premiums collected. Their jurisdiction is generally more or less territorial. Their instructions do not permit them to pass upon applications or proposals for insurance, or to make, alter, or discharge policies, or to grant permits, or waive forfeitures, or compromise claims. So far as any control over the terms of the contract is concerned, the intention of the company evidently is to restrict their powers to those of a special agency. But the business of general agents, like that of other canvassing agents, is to solicit custom for the company; and for this purpose they are furnished with blanks called applications, containing a long series of questions relating to the risk, which are to be answered by the applicant over his signature. (See form of application in the appendix.) The agent is expected, on behalf of the company, to interview the probable applicant, to use all proper inducements to secure him, to explain what the company requires, and also to write into the application the answers which the applicant almost always dictates orally. Sometimes through fraud, or carelessness, or error of judgment, the agent writes out the answers in form and substance materially different from the language used by the applicant; and the applicant, not knowing the error, or supposing that the agent understands best what the company wants, signs the paper as it is prepared.

The application is then forwarded by the agent to the home office, and though if accepted it becomes an essential part of the contract, and all its statements are warranted to be true, it is not before the insured at the time the contract is closed, nor does he have any opportunity of comparing it with the policy.

Local medical examiners have no authority to pass upon applications, but these are submitted to the medical director at the home office.

Pending the action of the company, the agent is allowed to give the applicant, on payment of the first premium, a provisional memorandum called a binding receipt, which simply amounts to an agreement on the part of the company, that if

the application shall be accepted the insurance is to be considered binding under the terms of the usual policy as of the date of the binding receipt, and that if the application is rejected the premium shall be returned. This practically prevents the applicant meanwhile from negotiating for the desired insurance with another company. The policy (see form of policy in the appendix) often provides that the contract shall not be binding until the first premium is paid in cash; but the company is sometimes aware that the agent has a habit of giving credit for special reasons in certain instances, on delivering the binding receipt, thus making himself responsible for the payment of the premium to the company. The general agent pays his own expenses, and receives or retains a commission on all premiums collected through his instrumentality, whether first or renewal premiums.

Sub-agents are often appointed by the general agents; hold a contract from them; have a narrower territory to canvass; have blank applications the filling up of which they, like general agents, superintend; are not generally supplied with binding receipts, but report any applications and bring any cash collected to the managing agent, though their contract generally provides that they may pay and report either to the general agent or to the home office. They pay their own expenses and receive a brokerage, but only on the first premium. This premium is ordinarily paid by the insured not to the sub-agent but to the general agent, and is turned in by him to the company.

There is nothing in the usual course of business as transacted by local agents of life companies, whether so-called general agents or sub-agents, from which any one dealing with them has the right to infer that they possess any authority to make or alter voluntarily the terms of policies, except, as above noticed, in some instances in regard to the method of paying premiums. But if the local agent of either class misstates answers given to him to be written into the application, and if the applicant cannot read, or without carelessness of his own is prevented from correcting the misstatement by conduct of the agent, the alleged breach of warranty based upon the misstatement is really the act of the company, and therefore the company is estopped, by what its agent has done

within the scope of his actual authority, from claiming that the insured is responsible for the misstatement.

§ 18. Agents of Fire Companies.—In fire insurance the business intrusted to agents is more complex. Three classes of agents will answer our present purpose: general managers, commissioned agents, and agents for soliciting only—that is, for receiving and forwarding proposals.

The business of general managers does not resemble that of the canvassing general agents of life insurance companies, though the latter are sometimes styled managers. Many foreign companies, fire and marine, have general managing agents in this country, and domestic companies sometimes have a managing agency in a large center like Chicago or Boston, though such agents may be advertised as special agents. The managers hold a contract from the home office, have wide discretions, and in the matter of making, altering, cancelling, and renewing contracts of insurance, giving permits, and adjusting and compromising claims, are allowed to stand very much in the stead of officers within the territory where they have jurisdiction. In case of large losses they usually ask for instructions from the home office. The agents under them, in some instances, report to them, and in others report direct to the home office.

Commissioned agents hold a written commission from the home office, granting them “full power to receive proposals for insurance in a certain place and vicinity, to fix the rates of premiums, to receive moneys, and to countersign, issue, and renew policies of insurance signed by the president and attested by the secretary (or signed by the manager), subject to the rules and regulations of the company, and to such instructions as may from time to time be given by the officers.” Policies and renewal receipts signed in blank by the proper officers are furnished them, and printed forms of riders, to enable them to fix rates and close contracts in their discretion, without conference with the home office. They often close a contract of insurance orally, it being understood that the usual policy is to be subsequently delivered, and they often take the responsibility of giving credit to the insured for premiums, making themselves responsible to the company; and of this custom

the company has knowledge. The officers probably never give express instructions to their commissioned agents to waive conditions of the policy in any way, except as provided by the policy, to wit, by written agreement indorsed thereon (see form of policy in the appendix); but the courts generally hold that by virtue of their apparent authority, such agents may waive any of the provisions of the policy by parol, including the stipulation that prohibits waivers except in writing, unless a restriction upon their authority has been brought to the attention of the insured. Where, however, by the written form of application, if one is used, or by the terms of the policy itself, notice is given to the applicant that the agents have no *authority* to waive conditions of the contract except by written agreement, it is evident that, at any rate, after such notice is received by the insured, neither the ostensible authority nor the actual authority of the ordinary commissioned agent is sufficient to enable him to effect a parol waiver of the conditions of the policy. In such a case, as a general thing, any disturbance of the contract can be accomplished by him only by a positive act on his part, within the scope of his agency, and while engaged in the business of the company, upon which an equitable estoppel against the company can be predicated under a rule of law which overrides the contract. But to prevent any misapprehension, it should be added here, that, in spite of such a recital or stipulation in the application or policy of alleged lack of power on the part of any of the officers or other representatives of the company, it may still be the fact that officers and managers really have an authority sufficiently broad to enable them to waive any of the conditions of the policy inserted for the benefit of the company, including the very clause which purports to restrict their powers. The commissioned agents within the scope of the business intrusted to them are considered general agents, except as their power may be specifically restricted. Their commission does not usually, in express terms, authorize them to adjust losses or compromise claims, but as quick settlements, before the insured have thought or talked much about their damage, are best for the insurers, it is a fact that the commissioned agents are generally permitted to settle small losses in their discretion. They are paid

by deducting a commission from the premiums which they collect.

Agents for soliciting only are sometimes appointed by general agents, but as a rule must be approved by the manager or home office. They have no express power to issue or alter policies, but they are to submit the proposals received by them to the superior authority. Sometimes, however, they are allowed to give binding or interim receipts, which protect the property of the applicant under the terms of the usual policy until the application is accepted or rejected, and often they are allowed to collect premiums and give credit. Where a written application is used, the applicant generally answers the questions orally, and the agent is expected to fill in the blanks, and is, in fact, intrusted with some power and discretion in this regard, like other agents engaged in canvassing for the benefit of their principal; thus questions of estoppel may arise like those already suggested. After this paper is signed by the applicant, it is forwarded by the agent to the proper office.

§ 19. Agents of Marine Companies.—Some marine companies require that all proposals for insurance shall be passed upon at the home office. Others grant this authority to their outside agents.

The applicant often fills up the blanks of a short printed form with a few essential particulars describing the subject of the proposed insurance, and sends it to the company as a note of inquiry, with a request to the company to name a rate, and the statements contained in the note of inquiry sometimes serve as the representations upon which the insurance is based.

Marine insurances are generally closed in this country by binding-slips, and often through the intervention of agents or brokers, or both. In London and in many other places the custom is for the broker to give a credit to the insured for the premium, and for the company to give credit to the broker. In that event the policy becomes binding upon its delivery, irrespective of the actual payment of the premium. In Great Britain, by the Stamp Act, a valid marine insurance can be effected only by a written policy; but in case of alleged error in the policy, the binding-slip is admissible in evidence to shed light upon the probable intent of the parties.

CHAPTER II.

GENERAL PRINCIPLES.

Nature of the Contract.

§ 20. **Indemnity.**—The controlling principle underlying the contract of insurance is indemnity. The agreement is *aleatory* or speculative in one sense; that is, the parties may not know whether the event insured against will occur or not: but compensation and not profit must be aimed at, and consequently the party insured must have at least an appreciable pecuniary interest in the subject of insurance, or else the contract will be altogether void.¹

Hence, it follows that the sum named in the policy is not the measure but the limit of recovery, and this is true whether there are successive losses or only one loss under the policy; and if the property is injured without total destruction, no matter how large the amount of insurance, the recovery is limited to the loss actually sustained. The principle that the contract of insurance is one of indemnity is in practice subjected to various modifications and limitations, which will presently be noticed. Such modifications have been engrafted upon the general rule largely out of regard to convenience. Thus the parties are permitted to agree in advance upon the value² of the subject of insurance by a valued policy, which in case of total loss is then conclusive evidence of the value, in the absence of fraud or an intent to evade the law, although in fact the estimated value may be erroneous; but this infringement upon the strict theory of indemnity is of great practical convenience, for often the

¹ *Halford v. Kymer*, 10 B. & C. 725.
Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205; 78 Am. Dec. 418. *Eager v. Atlas Ins. Co.*, 14 Pick. 141; 25 Am. Dec. 363.

² *Irving v. Manning*, 6 C. B. 391. Valued policy conclusive unless fraudulent. *Patapsco Ins. Co. v. Biscoe*, 7 Gill. & J. 293; s. c. 28 Am. Dec. 219.

casualty which destroys the insured property destroys with it the best evidence of its value. Accordingly, some of the States have passed valued policy laws applicable to realty, which provide that in the absence of fraud the value of the building written in the policy shall be taken to be its true value and the amount of loss where the building is wholly destroyed. These laws are not to be commended, however, although it is said that they are not intended to disturb the general doctrine of indemnity.¹

The rule requiring an insurable interest to give support to the contract is grounded upon the most important considerations of public policy, and has for many years been recognized as reasonable and expedient by all the courts. Wager contracts of insurance were at one time tolerated in England, but were forbidden by two statutes, applicable to marine and life policies respectively (19 Geo. II. c. 37; 14 Geo. III. c. 48).

The preamble of the former statute is as follows: "Whereas it hath been found by experience that the making of assurances, interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices whereby great numbers of ships with their cargoes have either been fraudulently lost and destroyed or taken by the enemy in time of war, and such assurances have encouraged the exportation of wool and the carrying on of many other prohibited and clandestine trades," etc.

In most of the States of the Union there are statutes against wagering contracts, and no excuse can be found in our day for doing away with the wholesome rule that insurance must be for indemnity and not for betting, notwithstanding a recent writer advances the contrary view.² A wager policy is more to be condemned than an ordinary wager, for it is not only at variance with sound business ethics, but it also offers peculiar inducements to the insured to bring about fraudulently the event insured against.

§ 21. Insurance does not always Grant Full Indemnity.—Only such damages as are caused proximately by the specified perils are covered by the policy. This rule,

¹ *Ampleman v. Citizens Ins. Co.*, 35 Mo. App. 308.

² *Cooke on Life Ins.*, §§ 58, 59.

also, is grounded upon considerations of utility, and ordinarily limits the scope of the contract because of the inconvenience of attempting to form an estimate after loss of the extent of remote, uncertain, and fluctuating elements of damage. Thus the incidental loss of trade, or of the use of a building or ship while being repaired, or of prospective profits, or any *pretium affectionis* attaching to the property destroyed, is too remote, and is not supposed to enter into the calculation of the contracting parties. Where, however, the parties do in fact expressly take into their account these more remote items of damage, they may make them the subject of a valid insurance. Thus the loss of use and occupation or of expected profits may be specifically insured as such, and frequently is. In marine insurance profits are generally added in the shape of a percentage to the value of the goods.

What results of fire and marine casualties are proximate, and what are remote, will be considered under the clauses of the policies.

§ 22. Insurance Grants Indemnity for Results of Negligence.—Where the loss is caused proximately by the peril insured against, the fact that the negligence of the insured or his agent contributed to the disaster will not deprive him of the protection of his policy; because it is of the nature and purpose of insurance to grant indemnity for the results of carelessness as well as of accident. This rule, as originally adopted by the courts, was somewhat arbitrary, but is also eminently just and sensible.¹

In the case of fire insurance, for example, the security offered to the insured by his policy would be seriously impaired if it were open to the insurers to plead in defense contributory negligence on the part of the insured or his servants; for many if not most fires have their origin in some act of carelessness. Accordingly the insured has the right to look to the company for indemnity notwithstanding any amount of carelessness in occasioning the loss, provided it does not involve an element of evil design, or illegality, or a violation of some contract

¹ *Mathews v. Howard Ins. Co.*, 11 Adams, 123 U.S. 67. *Gore v. Farmers' Mut. Fire Ins. Co.*, 48 N.H. 41; *N.Y.* 21. *Union Ins. Co. v. Smith*, 124 U.S. 405. *Orient Ins. Co. v.* 97 Am. Dec. 572.

obligation on his part, and provided the loss is the proximate result of the peril insured against.

This consideration, however, will not avail to excuse a breach of warranty, imposed upon the insured by the contract, which has been brought about by the negligence of himself or his agent; as, for example, a violation of the implied or express warranty that the ship must be seaworthy at the commencement of the voyage. Nor will it relieve the insured from the obligation of any other engagements of the contract; as where in the accident policy it is provided that the insurers shall be exempt for losses caused by voluntary exposure to unnecessary risk; or where in the fire policy it is stipulated that the company shall not be liable for loss caused by neglect of the insured to use reasonable means to save the property at and after a fire.¹

§ 23. Rule of Indemnity Qualified in Marine: Insured a Co-insurer.—In case of a partial loss, the rules of recovery applicable to fire and marine insurance, respectively, differ in a very important particular. In fire the insured recovers his damage up to the amount of the policy; but in marine, when the policy is not valued, the insured recovers only such proportion of the amount insured as the loss bears to the value of the whole interest of the insured in the property. This limits a recovery unless the property is fully insured.²

Thus if a man takes out an open fire policy for \$5,000 on his furniture worth \$10,000, and a loss of \$2,500 occurs, he will recover his loss in full; but if he has an open marine policy for \$5,000 on his cargo worth \$10,000, to which a loss of \$2,500 occurs, he will recover only \$1,250.

Sometimes by the attachment of a co-insurance clause the fire policy is made to resemble the marine contract in that respect. Otherwise in fire insurance where the property is only partially covered by insurance, the insured recovers in case of partial loss under the policy as much as though he had

¹ Richelieu & Ont. Navigation Co. v. Boston Marine Ins. Co., 136 U. S. 408. Whitney v. Ocean Ins. Co., 14 La. 485; 33 Am. Dec. 593.

² Nicolet v. Ins. Co., 3 La. 366; 23 Am. Dec. 458.

been paying premiums for full insurance, whereas in reality he has only been paying premiums for part insurance. ✓

§ 24. Double Insurance Contribution.—Growing out of the doctrine of indemnity is another; namely, that where different policies exist on the same insurance, subject and risk, the co-insurers stand somewhat in the attitude of co-sureties toward one another, to this extent, that each insurer in fire insurance must contribute ratably toward the loss without regard to the dates of the several policies—assuming, of course, that the policies are subsisting at the time of loss. Except for the usual contract limitation called the *pro rata* clause, the insured might recover his loss in full against any of the co-insurers, but not exceeding the amount of the policy, leaving the insurers to apportion the loss by subsequent contribution among themselves.¹

The rule of double insurance contribution in marine insurance as applied in America is quite different, and is founded upon the theory that policies attach in the order of their date. This rule will be considered in discussing the clauses of the marine policy.

§ 25. Subrogation.—Another corollary incident to the doctrine of indemnity is that of subrogation. Upon paying the loss under a policy the insurer becomes subrogated *pro tanto* to such rights and remedies as the insured may have against any third persons who are primarily liable to him for his damage sustained.

This rule likewise grows out of the principle that insurance is designed to protect the insured from loss, and not to be the occasion of gain to him. Otherwise the insured on pursuing his double remedy might be indemnified twice over.²

The United States Supreme Court says: "In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of

¹ *Wiggin v. Suffolk Ins. Co.*, 18 Pick. 381. *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 510. *Liverpool & G. W. Steam. Co. v. Phenix Ins. Co.*, 635. Note in 28 Am. Dec. 121.

² *Castellain v. Preston*, 11 Q. B. D. Co., 129 U. S. 397.

action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the assured. In a court of equity or of admiralty, or under some State codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation but the rights of the assured, and if the assured has no right of action none passes to the insurer."¹

Thus if a common carrier carelessly starts a fire by sparks from a locomotive, which burns the property of the insured, the insurer upon paying the loss under the policy becomes subrogated to the right of recourse which the insured had against the common carrier. The latter must not be exonerated or released without the consent of the insurer.²

A release given to the negligent party by the insured without the consent of the insurer will in such a case bar his right of action upon the policy.³

If the wrong-doer pays the assured after the insurers have made a payment under the policy, it is a fraud upon the latter, provided the wrong-doer has knowledge of the fact, and will not protect him from liability to the insurers. If the insurers, after payment of the damage by the wrong-doer to the insured, voluntarily pay the policy, they cannot maintain an action against the wrong-doer; and if the assured receives his damages from the wrong-doer before payment is made by the insurers under the policy, the amount so received will be applied *pro tanto* in discharge of the policy.⁴

Inasmuch as the insurers are only entitled to such rights as are vested in the insured, there will be no subrogation in case the insured has stipulated in a bill of lading from the common carrier that the latter shall have the benefit of insurance; and

¹ St. Louis, I. M. & S. Railway Co. v. Commercial Union Ins. Co., 139 U. S. 235.

² Newcomb v. Cincinnati Ins. Co., 22 Ohio State, 382; s.c. 10 Am. Rep. 746.

³ Dilling v. Draemel, 16 Daly, 104 (1890). Hall v. The Railroad Companies, 13 Wall. 367.

⁴ Conn. Fire Ins. Co. v. Erie Ry. Co., 73 N. Y. 399.

in case the insured has been so imprudent as to agree to give the insurers the benefit of subrogation, and has also made an inconsistent stipulation with the common carrier, he may find himself without security for his loss.¹

Similarly, where a mortgagee has taken out a policy for his own benefit, and not for the benefit of the mortgagor, upon the property of the mortgagor covered by the mortgage, it is held by the better authority, that, even in the absence of an express provision to that effect in the policy, the insurer upon paying the mortgagee the insurance money becomes subrogated *pro tanto* to the mortgage security as against the mortgagor.²

But where the mortgagor has any interest in the policy, either by payment of premiums or by agreement with the mortgagee, then there will be no subrogation in favor of the insurers, for the latter take only such rights as the assured can give.³

A mortgagee is not required to exhaust his remedy upon the mortgage before enforcing his policy, and he can maintain his action on the policy although the property after the fire is still equal in value to the amount of the mortgage debt.⁴

In case the insured under a life policy is killed, or in case property of the insured under a fire policy is feloniously destroyed, no right of subrogation exists in favor of the insurers.⁵

§ 26. Insurable Interest: Fire.—Every interest in property, or in relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest.

A learned justice of the New York Court of Appeals, who has made the subject of insurance law his profound study, states the rule in the following words: *(Judge Van)*

“It would seem, therefore, that whenever there is a real interest to protect, and a person is so situated with respect to the subject of insurance that its destruction would or might reason-

¹ Platt v. Richmond, Y.R. & C. R.R. Co., 108 N. Y. 358. Fayerweather v. Phenix Ins. Co., 118 N. Y. 324.

² Carpenter v. The Providence Washington Ins. Co., 16 Peters, 495. *Contra*, International Trans. Co. v. Boardman, 149 Mass. 158.

³ Kernochan v. N. Y. Bowery Fire Ins. Co., 17 N. Y. 441. Loudon v. Waddle, 98 Penn. State, 242.

⁴ Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 343.

⁵ Ins. Co. v. Brame, 95 U. S. 754.

ably be expected to impair the value of that interest, an insurance on such interest would not be a wager within the statute, whether the interest was an ownership in, or a right to the possession of the property, or simply an advantage of a pecuniary character having a legal basis, but dependent upon the continued existence of the subject. It is well settled that a mere hope or expectation, which may be frustrated by the happening of some event, is not an insurable interest.”¹

An insurable interest may be legal or equitable, vested or contingent.² It may be an existing interest—as, for example, the ownership in fee, or for life, or for years, or a right by mortgage or other lien—or it may be merely an inchoate interest, like a ship-owner's right to freight on goods laden on his ship, or the equitable right to a title under an executory contract of purchase,³ or an interest in expected profits on goods consigned for sale.⁴ A tenant by curtesy or dower may insure.⁵ The interest may arise from some title to the property or from a mere liability in respect to the property. An insured owner of property does not lose his insurable interest by giving a lease or a mortgage,⁶ or making an executory contract to sell the property,⁷ or even by a foreclosure, so long as any title or equitable right to the property remains in him.⁸ And although his title to the insured property may be defective or voidable, it may still be the basis of a valid insurance.⁹ But a mere contingent or expectant interest in anything, not founded upon an actual right to a thing, nor upon any valid contract for it, is not insurable. Lord Eldon illustrates this distinction in an elaborate opinion upon marine insurance, where the same general doctrine prevails. “Suppose A to be possessed of a ship limited to B in case A dies without issue;

¹ *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 12, by Andrews, J. *Williams v. Roger Williams Ins. Co.*, 107 Mass 377.

² *Fenn v. New Orleans-Mut. Ins. Co.*, 53 Ga. 578. *Nat. Filter Oil Co. v. Citizens Ins. Co.*, 106 N. Y. 535.

³ *Brogden v. Manufs. & Mut. Fire Ins. Co.*, 15 Can. L. J. 31. *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385.

⁴ *French v. Hope Ins. Co.*, 16 Pick. 397.

⁵ *Franklin Fire Ins. Co. v. Drake*, 2 B. Mon. (Ky.), 47.

⁶ *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325.

⁷ *Davis v. Quincy Mut. Fire Ins. Co.*, 10 Allen, 113.

⁸ *Strong v. Manufs. Ins. Co.*, 10 Pick. 40. *Essex Savings Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335 (1889).

⁹ *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535.

that A has twenty children, the eldest of whom is twenty years of age; and B is ninety years of age; it is a moral certainty that B will never come into possession, yet this is a clear interest. On the other hand, suppose the case of the heir-at-law of a man who has an estate worth £20,000 a year, who is ninety years of age, upon his death-bed, intestate, and incapable from incurable lunacy of making a will, there is no man who will deny that such an heir-at-law has a moral certainty of succeeding to the estate; yet the law will not allow that he has any interest, or anything more than a mere expectation."¹

It would be difficult to enumerate all the classes of persons who may have an insurable interest in property their own, or held by them for others, or to which they have some right. Among them may be named owners, trustees and *cestuis que trust*, executors and administrators, co-partners, consignees, factors, agents, mortgagors and mortgagees, lienors, vendors and vendees, lessors and lessees, sureties, indorsers, common carriers, warehousemen, wharfingers, innkeepers, pledgees, and depositaries generally, stockholders in property of the corporation, and creditors and sheriffs in property attached.²

A mere trespasser or intruder, or one who has no color of title to property, has no insurable interest in it;³ and it has also been held that a creditor at large, having no specific lien upon the property of his debtor, has no insurable interest in such property.⁴ Whether a judgment creditor has an insurable interest before an attachment or levy upon his debtor's property, is open to question. On principle, as well as on the authority of a New York case, it would seem that he has.⁵ But the question is probably of no great practical importance, for an insurer would not be apt to take such a risk.

From the list just enumerated, the fact will be inferred that the same person may have different insurable interests in the same property, and also that different persons may have separate insurable interests in the same property.⁶ Where the

¹ *Lucena v. Craufurd*, 2 B. & P. N. R. 324.

² *Strong v. Mfrs. Ins. Co.*, 10 Pick. 40; s. c., 20 Am. Dec. 507, note 510-518.

³ *Sweeny v. Franklin Ins. Co.*, 20 Pa. St. 337.

⁴ *Grevemeyer v. Southern Mut. Ins. Co.*, 62 Pa. St. 340.

⁵ *Rohrback v. Germania Fire Ins. Co.*, 62 N. Y. 47.

⁶ *Ins. Cos. v. Thompson*, 95 U. S. 547. *Carruthers v. Sheddon*, 6 Taunt. 14.

insured is jointly interested with others, as in the case of co-partners or trustees, or where he is intrusted with goods of other persons, as in the case of a common carrier or warehouseman or factor, he may either insure his own interest, or his own liability in respect to the property, or he may insure the property to its full value for the benefit of all concerned.¹

§ 27. Insurable Interest: Life.—Every person has an insurable interest in the life and health of himself, of any person on whom he depends wholly or in part for education or support, of any person under a legal obligation to him for the payment of money, or respecting property or services of which death or illness might delay or prevent the performance, and of any person upon whose life any estate or interest vested in him depends.²

Thus a partner has an insurable interest in the life of a co-partner,³ a creditor of a co-partnership in the life of each co-partner,⁴ and all creditors in the lives of their debtors.⁵ This is true, although the debt is voidable,⁶ or not enforceable on account of the Statute of Limitations.⁷ A clerk has an insurable interest in the life of his employer, and a master in the life of his servant if he has a legal claim to his services.⁸ A woman in the life of her fiancé.⁹ A surety on a bond in the life of the principal.¹⁰ A creditor of an infant for necessities sold to the infant has an insurable interest in his life.¹¹ A voidable note given for a debt contracted during the minority of the debtor is sufficient to give an insurable interest, because the infant

¹ Fire Ins. Asso. v. Merchants, &c., Trans. Co., 66 Md. 339. Waters v. Assurance Co., 5 E. & B. 870.

² Bevin v. Conn. Mut. L. Ins. Co., 23 Conn. 244. Morrell v. Trenton Mut. Ins. Co., 10 Cush. 282. Baker v. Union Mut. L. Ins. Co., 43 N. Y. 283. Thompson v. American, &c., Ins. Co., 46 N. Y. 674. Warnock v. Davis, 104 U. S. 775. Wright v. Mutual Ben. Life Assn., 118 N. Y. 237.

³ Conn. Mut. Life Ins. Co. v. Luchs, 108 U. S. 498.

⁴ Morrell v. Trenton Mut. L. and F. Ins. Co., 10 Cush. 282; s. c., 57 Am. Dec. 92.

⁵ Goodwin v. Mass. Mut. Life Ins. Co., 73 N. Y. 480.

⁶ Rivers v. Gregg, 5 Rich. Eq. 274.

⁷ Rawls v. Amer. Mut. Life Ins. Co., 27 N. Y. 282; s. c., 84 Am. Dec. 280.

⁸ Hebdon v. West, 3 Best & Smith, 578.

⁹ Chisholm v. National Capitol Life Ins. Co., 52 Mo. 213; s. c., 14 Am. Rep. 414.

¹⁰ Hebdon v. West, 3 Best & Smith, 579. Branford v. Saunders, 25 Weekly Reporter, 650.

¹¹ Rivers v. Gregg, 5 Rich. Eq. 274.

alone can avoid the note.¹ Ties of affection or kinship do not of themselves constitute an insurable interest. Thus an adult son has no insurable interest in the life of his father simply by virtue of the relationship.² Nor a nephew in the life of an uncle.³ Nor a son-in-law in the life of a mother-in-law.⁴ Nor a brother in the life of a brother.⁵ But certain relationships are so apt to involve a legal claim to support or pecuniary obligation or advantage that their existence is held to establish conclusively an insurable interest.⁶

Thus a wife has an insurable interest in the life of her husband, and the validity of the policy will survive a divorce.⁷ And the illegality of the marriage will not defeat it.⁸ And, ordinarily, at least, a husband has an insurable interest in the life of his wife.⁹ And a father in the life of his minor son.¹⁰ Any element of dependency coupled with the relationship will furnish the basis for an insurable interest. Thus where the brother had supported and educated his sister it was held that she had an insurable interest in his life.¹¹

The interest which one has in his own life, being incapable of exact pecuniary estimate, may be valued at any amount which the parties agree upon, and so generally of all insurable interests which are founded upon relationship;¹² but if a creditor takes out an insurance upon the life of the debtor greatly in excess of any loss that he could sustain by the death of the insured, the transaction may be held to amount to a wager.¹³

§ 28. Insurable Interest: Marine.—The same general principles are applicable as in fire insurance. Thus the

¹ *Dwyer v. Edie*, Park on Ins. 432.

² *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35; s. c., 22 Am. Rep. 180.

³ *Mowry v. Home Life Ins. Co.*, 9 R. I. 346.

⁴ *Rombach v. Piedmont & A. Life Ins. Co.*, 35 La. Ann. 233; s. c., 48 Am. Rep. 239.

⁵ *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 107.

⁶ *Corson's Appeal*, 113 Pa. St. 438.

⁷ *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 460. *Baker v. Union Mut. L. Ins. Co.*, 43 N. Y. 283.

⁸ *Equitable Life Ass. So. v. Paterson*, 41 Ga. 338; s. c., 5 Am. Rep. 535.

⁹ *Currier v. Continental Life Ins. Co.*, 57 Vt. 496.

¹⁰ *Mitchell v. Union Life Ins. Co.*, 45 Me. 104; s. c., 71 Am. Dec. 529.

¹¹ *Lord v. Dall*, 12 Mass. 115; s. c., 7 Am. Dec. 38.

¹² *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 241.

¹³ *Fox v. Penn. Mut. Life Ins. Co.*, 4 Big. Ins. Cas. 458. *Grant v. Kline*, 115 Pa. St. 618.

owner of a ship has in all cases an insurable interest in it, even when it has been chartered by one who covenants to pay him its value in case of loss; and he also has an insurable interest in expected freight which he would have earned but for the intervention of the peril insured against. And the charterer of a ship also has an insurable interest in it.¹

The insurable interest of the owner of a ship hypothecated by bottomry is only the excess of its value over the amount secured by bottomry. The lender on bottomry may insure his interest in the ship to the amount of the loan.²

§ 29. The Payee or Assignee of Life Policy need not have Insurable Interest.—If the insured has an insurable interest to support the policy when it is taken out, he may make it payable to any one, or, according to the weight of authority, he may subsequently assign it to any one, whether such transferee has an insurable interest or not, unless the transaction from its inception is a mere cover to avoid the statute against gambling contracts.³

§ 30. When must Insurable Interest Exist.—In fire and marine insurance the insurable interest must exist not only at the commencement of the risk, but also at the time of loss; but in life insurance it may cease at any time after the making of the contract. A creditor, for example, who has taken a policy upon the life of his debtor, may, on the death of the insured, recover the full amount of the insurance, notwithstanding the debt may have been previously paid.⁴ Thus it will be seen that the contract of life insurance is not one of strict indemnity, but is sufficiently controlled by that doctrine to prevent it from being a wager in its inception.

The leading English case of *Dalby v. India & London Life Assur. Co.*, 15 C. B. 365, which overruled *Godsall v. Boldero*, 9 East, 72, unquestionably gives the sound and sen-

¹ *Oliver v. Greene*, 3 Mass. 133. ⁴ *Dalby v. The India & London Life Assurance Co.*, 15 C. B. 365. St. *Barber v. Fleming*, L. R., 5 Q. B. 59.

² *Robertson v. United Ins. Co.*, 3 John v. Am. Mut. Life Ins. Co., 13 John. Cas. 499. N. Y. 31. *Scott v. Dickson*, 108 Pa. St.

³ *Olmsted v. Keyes*, 85 N. Y. 593. 6; s. c., 56 Am. Rep. 192.

Contra, *Warnock v. Davis*, 104 U. S. 775.

sible rule, though Porter endeavors to defend the doctrine of the latter case.¹ The rate of premiums in life insurance is based upon the supposition that the event upon which payment is to be made to the insured will certainly occur at some time or other, and if a creditor after paying premiums for a long term of years was likely to lose all the benefit of his insurance, it would practically prevent the use of this important kind of security.

§ 31. Temporary Suspension does not Avoid.—

If there is no provision in the contract prohibiting a change of interest, a temporary suspension of the interest of the insured does not vitiate a policy of insurance, but only suspends its operation.²

§ 32. Insurable Interest as Related to Measure of Recovery: Fire and Marine.³—The general rule is indemnity to the insured commensurate with his insurable interest at the time of loss, as shown by proof, or by appraisal, or as previously established by agreement in a valued policy.

If the insured is the owner of the property destroyed, he is entitled to recover its market value at the time of the loss, without making any deduction for the amount of mortgage or other incumbrances upon it, for these incumbrances are held to be of no concern to the insurers.⁴

A mortgagee recovers the amount of the mortgage debt existing at the time of the loss without regard to the value of the mortgage or other security which he may hold on account of the same debt.⁵

Inasmuch as the right of subrogation which has already been described does not arise until the loss occurs, the policy of insurance will not be affected by any release or disposition which the mortgagee may make of his other securities before the fire.

¹ Porter on Ins., p. 15.

² *Worthington v. Bearse*, 12 Allen, 382. *Lane v. Maine Mut. Fire Ins. Co.*, 13 Me. 44.

³ In this section I have followed, to some extent, the arrangement given by George M. Sharp, Esq., of the Baltimore bar, in his admirable synopsis of

fire insurance law prepared for the Yale Law School.

⁴ *Columbian Ins. Co. v. Lawrence*, 10 Pet. 507.

⁵ *Sussex Co. Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.). 541. *Kernochan v. N. Y. Bowery Fire Ins. Co.*, 5 Duer, 1.

But after the loss has occurred any release of such securities will discharge the insurers *pro tanto* in case they are entitled to the right of subrogation.¹

Where a common carrier, warehouseman, or other bailee, or a broker or factor, insures for his own benefit, he recovers the value of his interest in the subject of insurance, whether it be his commissions or profits or advances. If he has insured against his liability as bailee for the loss of the property, he will be entitled to recover its cash or market value at the time of loss; and so, also, if he insures for the benefit of the owners of the goods intrusted to him as well as for his own benefit, he will be entitled to recover the full value of the property insured, holding any balance above his own interest as trustee for the owners.² A lessee is entitled to recover for the value of his term.³ A lessor under a rent policy is entitled to recover the value of his rent, which is generally agreed upon in advance by a valued policy, and such value in the absence of fraud is conclusive.⁴ A vendee under an executory contract of purchase is entitled to recover the full value of the property insured by him, for the purchase price of which he is obligated.⁵ A vendor under such a contract, having an insurable interest in the property of which he still holds the title, has a right to recover its full value unless the policy limits his interest. The court cannot assume that the executory contract will be completed, and the rights of the insured become fixed, at the time of the fire.⁶ But in England it is held that after the vendor has received the amount of his purchase price the insurers can recover back the insurance moneys under the doctrine of subrogation. This decision carries the doctrine of subrogation to an extreme limit, and it would appear that the views of Justice Chitty in the lower court⁷ are more convincing than the opinion of the appellate court.⁸ The position of the

¹ Thomas v. Montauk Fire Ins. Co., western Ins. Co., 34 Me. 487. Kane 43 Hun. 218. v. Commercial Ins. Co., 8 Johns. 229.

² De Forest v. Fulton Fire Ins. Co., ⁵ Bartlett v. Looney, 3 Vict. L. R. 1 Hall, 84. Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527. Eq. 15.

³ Niblo v. North Amer. Ins. Co., 1 St. 513. ⁶ Insurance Co. v. Updegraff, 21 Pa. Sandf. 551. ⁷ 8 Q. B. D. 613.

⁴ Carey v. London Prov. Fire Ins. ⁸ Castellain v. Preston, L. R., 11 Q. Co., 33 Hun. 315. Cushman v. North- B. D. 380 (1883).

latter is defended in learned and instructive opinions, delivered by Justices Brett, Cotton, and Bowen, which are too long for insertion among the selected cases of the second part of this book, but it is not easy to find in them any adequate reason for the conclusion at which the court arrived.

Where a wrong-doer causes the loss to the insured, and the insurers pay it, their right to subrogation is plain. Where a mortgagee holds a mortgage as collateral security for the payment of a debt, and the insurers pay the mortgagee under the mortgagee's policy, many courts, though not those of Massachusetts, regard the insurance and the mortgage as two securities for the payment of the same loss in such a sense as to demand the application of the doctrine of subrogation in favor of the insurers; though it may not be clear, upon principle, why the insurers should be subrogated to the mortgage, rather than the mortgagor to the insurance. But it cannot be maintained that the purchase price arranged for in an executory contract of sale is in any respect the subject of the insurance already existing upon the land. It is rather the fruits or profits incidental to the ownership of the property which is still vested in the insured. The contract of sale is altogether independent of the contract of insurance, and, unless prohibited by the terms of the policy, has no relation to it; and this may be well illustrated by supposing that the purchase price under the executory contract is to be paid in services instead of money. In that event, it would seem almost grotesque to contend that, after a settlement and payment under the policy, from which the English court admitted there was no escape, the insurers may claim the benefit of future services to be rendered to the insured by virtue of a contract made subsequent to the policy. No such agreement of recoupment ought to be read into the contract of insurance by the court, unless equity or public policy imperatively demands it. If the contract to sell violates one of the conditions of the policy, the insurers will be exonerated. If it does not, then they ought to pay according to their promise, and whether the insurance money ultimately remains with the vendors or the vendees depends upon contract relations with which the insurers are not in privity.

A re-insurer is entitled to recover the amount which he is obligated to pay by the original insurance, and this he may

recover by reason of his liability before he has actually made payment thereof to the insured.¹ Under a policy for loss of use and occupation of a mill or other building while undergoing repairs or while being rebuilt after the fire, the amount of recovery is usually defined by the policy as so much per day; and provision is often made for ascertaining by appraisal the amount of probable loss of time.

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§ 33. Contract is Personal.—A contract of insurance on property is personal; that is, it does not pass to the new owner by virtue of a transfer of the title of the property.² Hence, upon closing a sale or conveyance, it is of consequence to the vendee to see that new policies are taken out, or that the proper indorsements consenting to the transfer are made by the insurers upon the old policies.

This rule is reasonable; for, as was explained in the introductory chapter, the moral risk assumed by the insurers depends upon the character and circumstances of the insured. They have a right to know with whom they are contracting, and no new party can be thrust upon them without their consent. However important the policy of insurance may be to the owner, for the time being, of the property, it in no respects runs with the land or other property.

§ 34. Contract is an Entirety.—If the risk has not attached at all, the premium is returnable, unless the policy is avoided by fraud of the insured from the inception of the contract; but, if the risk has once attached, the premium is not to be apportioned, unless by special agreement.³

§ 35. Assignment of Policies.—Before loss a fire policy is not assignable without the consent of the insurer; but in case of a marine or life policy the rule is otherwise,⁴

¹ Hone v. Mutual Safety Ins. Co., 1 Sandf. 137.

² Powles v. Innes, 11 M. & W. 10.
 Lett v. Guard. Fire Ins. Co., 135 N. Y. 82. Raynor v. Preston, 18 Ch. D. 1.

³ Blaeser v. Milwaukee Mut. Ins. Co., 37 Wis. 31; s. c., 19 Am. Rep.

747. Joshua Handy Works v. Ins. Co., 86 Cal. 248; s. c., 21 Am. St. Rep. 33 (1890). Ins. Co. v. Pyle, 44 Ohio St. 19; s. c., 58 Am. Rep. 781. Heinely v. So. Car. Ins. Co., 1 Mill, 153; s. c., 12 Am. Dec. 623.

⁴ Earl v. Shaw, 1 Johns. Cas. 314; s. c., 1 Am. Dec. 117.

unless, as is customary, a clause of the policy forbids an assignment until the consent of the insurer is obtained and indorsed upon the policy. The assignability of the marine policy was early established by custom, and grew out of the demands of mercantile business, which overrode the theory that the contract is strictly personal. The value of a life policy, too, would often be seriously diminished unless the owner of it were able to make it the source of immediate benefit. Inasmuch as it is payable upon an event which sooner or later is certain to occur, it very much resembles an ordinary *chose in action*, and in most cases no just reason could be given why it should not be assignable, provided the insured is also the beneficiary.

Under the New York Act of 1840, chap. 80, designed to secure to the wife and children of the insured the benefits of life insurance free of creditors' claims, it was held that neither the insured nor his wife could assign or disturb the irrevocable interest thereby created.¹

But by the Act of 1873, chap. 821, provision is made for surrendering the policy in favor of a married woman or of her and her children; also, if she has no children or issue thereof, for disposing of such policy by will or deed.²

And by the Act of 1879, chap. 248, the wife or her legal representatives may, with her husband's written consent, assign any policy issued within the State upon his life for her benefit and use, to any person, or may surrender it to the insurer. The policy is assignable whether the wife have children or not, and the husband's assent is sufficiently shown by his joining with the wife in the assignment.³ Similar statutes have been passed in other States (see appendix).

§ 36. Vested Interests: Life Insurance.—Where the insured designates another person as beneficiary, the right of the latter, as a rule, at once becomes vested so that it cannot be disturbed by assignment or will or in any way without his consent, unless the right to make a new appointment is reserved by the terms of the policy itself, or by the regulations

¹ U. S. Trust Co. v. Mutual Benefit Life Ins. Co., 115 N. Y. 152. Eadie v. Slimmon, 26 N. Y. 9. Brick v. Campbell, 122 N. Y. 337.

² Frank v. Mut. Life Ins. Co., 102 N. Y. 266.

³ Anderson v. Goldsmidt, 103 N. Y. 617.

of the company subject to which the policy is issued, or by provision of law.¹

A different rule is adopted in Wisconsin, where it has lately been held that one who has procured a policy upon his own life for the benefit of another, and has paid the premiums thereon, may dispose of the insurance money to the exclusion of the beneficiary named in the policy, during the lifetime of such beneficiary.²

If a husband insures his life for his wife, and pays all the premiums with money embezzled from his firm, the proceeds of the policy will belong to it; but if the first premium is honestly paid by him, and subsequent premiums with money stolen from his firm, the proceeds of the policy will belong to the wife, charged with a lien to the firm for the amount of its money used for premiums.³

If the beneficiary named in a policy of life insurance dies before the insured, the latter having taken out the insurance and paid the premiums, a new appointment may be made by the insured, provided the first appointment was purely gratuitous, especially if the insured has kept possession of the policy.⁴

This rule proceeds upon the principle that the intent of the insured to benefit the person of his selection having been defeated by death, he ought to have the opportunity of decid-

¹ *In re King*, 14 Ch. D. 179. *Washington Cent. Bank v. Hume*, 128 U. S. 195. *Garner v. Germania Life Ins. Co.*, 110 N. Y. 266. *Fowler v. Buttery*, 78 N. Y. 68. *Stilwell v. Mutual Life Ins. Co.*, 72 N. Y. 385. *Lemon v. Phenix Life Ins. Co.*, 38 Conn. 294. *Unity Mut., etc., Assoc. v. Dugan*, 118 Mass. 219. *Norris v. Mass. Mut. Life Ins. Co.*, 131 Mass. 294. *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193; s. c., 38 Am. Rep. 289. *Glanz v. Gloeckler*, 104 Ill. 573; s. c., 44 Am. Rep. 94. *Re Richardson*, 47 Law Times, N. S., 514. *Butler v. State Mut. Life Assur. Co.*, 55 Hun. 296. *Phipard v. Phipard*, 55 Hun. 438.

dissenting justice wisely remarks: "The common law, as well as truth, is always in harmony with itself. Assumed evidences of it in the shape of judicial decisions may be in conflict, and sometimes are. It is more important to preserve the law in its integrity than an erroneous interpretation of it. The repetition of an exposed error is more destructive than the original. No decision should take rank as an evidence of law which is not in harmony with the logic of the law, especially when sanctioned by the great weight of authority."

³ *Holmes v. Davenport*, 27 Abb. N. C. 341 (1891).

² *Estate of Breiton*, 78 Wis. 33 (1890). But this case is in conflict with many adjudications by other courts, and the

⁴ *Bickerton v. Jaques*, 12 Abb. N. C. 25. *Shields v. Sharp*, 35 Mo. Appeals, 178.

ing whether the policy shall inure to the benefit of the representatives of the deceased, or shall go to some other beneficiary. The decisions are somewhat inharmonious, but any rule depriving the insured of control, in such a case, over a policy taken out and kept alive by him, would not only be inequitable but also in many cases ineffective, for when the next premium became due the insured might allow the policy to lapse. In case, however, a new appointment is not made by the insured before his death, the representatives of the deceased appointee, and not the representatives of the insured, will receive the proceeds of the insurance.¹

In case the insured, having an insurable interest in the life of another, takes out a policy upon that life, and pays the premiums for the benefit of himself, the policy belongs to him, and the life insured has no interest in it or control over it.

The legislatures of some of the States have provided that a change of beneficiary may be made in certain cases by the insured without the consent of the payee first named, provided of course the first appointment was not founded upon any valuable consideration moving from the payee (see appendix).

§ 37. Relations between Insurer and Insured: Life.—The policy holder is a creditor, and not a *cestui que trust* of the company, and hence he cannot call upon the company, in the absence of fraud, to disclose to him their affairs in general, or to make an account to him for his share of dividends or profits;² and he is not a partner in the company.³

As soon as the risk attaches, the insured, under the usual form of policy, becomes debtor to the insurer for the first premium, if it has not been paid. But as to the future premiums payable in advance, the relation of debtor does not exist, for the contract does not contain a promise on the part of the insured to pay the premium, but the payment is simply made the condition of the continuance of the contract.⁴

¹ Walsh v. Mutual Life Ins. Co., 61 Hun. 91 (1891). Continental Life Ins. Co. v. Palmer, 42 Conn. 60.

² Uhlman v. N. Y. Life Ins. Co., 109 N. Y. 421. Matthew v. Northern Assur. Co., 9 Law Rep. Ch. Div. 80.

³ People v. Security Life Ins., &c., Co., 78 N. Y. 114.

⁴ Goodwin v. Mass. Mut. Life Ins. Co., 73 N. Y. 480. Worthington v. Charter Oak Life Ins. Co., 41 Conn. 372; s. c., 19 Am. Rep. 495.

§ 38. The Contract is a Property Right: Life.—

Being a chose in action, it is not subject to attachment or execution, except as in New York by statute,¹ but may be reached by proper proceedings in equity, unless it is by statute secured to the beneficiary free from the claims of creditors.²

Most of the States have passed statutes upon this subject, sometimes in protection of all classes of beneficiaries, and sometimes for the benefit of the wife and children (see appendix).

¹ Code Civ. Pro., sec. 648.

² Bassett v. Parsons, 140 Mass. 169.

CHAPTER III.

GENERAL PRINCIPLES—CONTINUED.

Consummation and Construction of the Contract.

THE course of business in closing insurance contracts is oftentimes so far *sui generis*, that it will be advisable to consider to what extent the ordinary rules of law are applicable to such a case. Many important classes of contracts have no validity at all unless evidenced by writing; and whenever parties see fit to reduce their engagements to the form of a written instrument, whether required by law to do so or not, it is presumed that the contents of the document will correctly and conclusively record the final results of their negotiations, and that its execution and delivery will precisely define the time when the agreement goes into operation. But, in the actual conduct of their affairs, men do not always take the trouble to conform to any such preconceived notions, if their convenience or the exigencies of their business suggest a different course. Often a man wants to insure his house, or goods, or ship without delay. In most of the States of the Union there is no law preventing a valid oral contract of insurance, and so it frequently happens that fire and marine insurances are closed before the insured has seen his policy, or has been made acquainted with its conditions. In fact, the policy may never be delivered to him at all, or not until after the loss has occurred for which it was intended to grant indemnity;¹ and, when the policy is received by him, he may find that its terms do not correspond with the oral agreement of insurance already entered upon.

§ 39. Requisites of a Complete Contract.—The requisites which must be specified to make a valid policy are

¹ Thompson v. Adams, L.R., 23 Q.B.D. 361 (1889).

the names or description of the parties, the rate of premium, the property or life insured, the risks insured against, and the term or duration of the insurance;¹ and to constitute a contract of insurance there must be, as in other cases, 'a meeting of the minds of the parties—that is, a mutual assent to all the terms of the agreement.'² Thus, if both parties intend that the insurance shall cover a certain ship or a certain house, the contract will not necessarily be invalidated because by mutual mistake they misname it in the policy; but if one party has in mind one ship, and the other party has in mind another ship, although the two ships may have the same name, there is, speaking generally, no contract.³

§ 40. The Particulars are sometimes Understood.—It is not necessary, however, that all the particulars of a contract should be made the subject of express negotiation between the parties; for it may well be understood, in the absence of any express declaration to the contrary, that the usual form of policy is acceptable to both parties.⁴

Even the essentials of the contract may often be agreed upon, inferentially, by reference to a prior course of dealing between the parties.⁵

Thus if A, whose policy is about to expire, goes to the office of the insurer, and requests a renewal for a year, and receives the answer from the proper representative of the company that he may consider his policy as renewed, and that the renewal receipt will be sent in the course of a few days, and that he may then pay the premium, the contract of renewal is complete and binding, whether the new policy or renewal receipt may chance to be delivered before the fire or not.⁶

¹ *Boice v. Thames & M. Marine Ins. Co.*, 38 Hun. 246.

² *Insurance Co. v. Lyman*, 23 Wall. 85. *Goddard v. Insurance Co.*, 108 Mass. 56; s.c., 11 Am. Rep. 307.

³ *Hughes v. Mercantile Mut. Ins. Co.*, 55 N. Y. 265. *Sanders v. Cooper*, 115 N. Y. 279.

⁴ *DeGrove v. Met. Ins. Co.*, 61 N. Y. 602; s.c., 19 Am. Rep. 305.

⁵ *Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 190. *Boice v. Thames & M. Marine Ins. Co.*, 38 Hun. 246. *Ruggles v. Am. Central Ins. Co.*, 114 N. Y. 418.

⁶ *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171; s.c., 17 Am. Rep. 322. *Eames v. Home Ins. Co.*, 94 U. S. 621.

§ 41. Contract may be Closed by Parol.—An oral contract of insurance or an oral contract to issue a policy is valid, unless prohibited by statute as by the Civil Code of Georgia or sometimes by Stamp Laws, and will be binding from the time the oral contract is complete, although the loss occur before a policy is issued.¹

The statute of frauds is not applicable;² and, although the charter of a company provides that the contract of insurance must be in writing, this requirement is by most courts held to be a direction to the company, and not binding upon an innocent party who has parted with value to the company in good faith under an oral contract.³

But the representative of the company to bind it, by parol or otherwise, must be one having authority, and stipulations in the application or policy in restriction of his authority will, if true in fact, be binding upon the insured, at any rate after notice of them is received.⁴

§ 42. Contract to issue Policy is Governed by Terms of Usual Policy.—Whether the contract of insurance is closed by parol or by a preliminary binding receipt, the legal presumption is that the usual policy is to follow. Hence the stipulations and conditions of the policy are binding upon the insured from the moment of closing the contract, although the policy may not be received until after the loss, and although the insured, through ignorance of its conditions, may have forfeited his rights thereunder.⁵

So, also, after delivery of the policy the insured is conclusively presumed to be acquainted with its terms and is bound by

¹ Insurance Co. v. Colt, 20 Wall, State, 172. Palmer v. Hartford Fire 560. Fish v. Cottenet, 44 N. Y. 538; Ins. Co., 54 Conn. 488. s. c., 4 Am. Rep. 715. Ellis v. Albany City Fire Ins. Co., 50 N. Y. 402. Van Loan v. Farmers' Mut. Fire Ins. Co., 90 N. Y. 280.

² Phoenix Ins. Co. v. Spiers, 87 Ky. 286. Wiebeler v. Milwaukee, &c., Ins. Co., 30 Minn. 464. Ala. Gold Life Ins. Co. v. Mayes, 61 Ala. 163.

³ Parish v. Wheeler, 23 N. Y. 494. Lloyd v. West Branch Bank, 15 Pa.

⁴ Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5. Ins. Co. v. Norton, 96 U. S. 240. Kister v. Lebanon Mut. Ins. Co., 128 Pa. State, 553; s. c., 15 Am. St. Rep. 696. Ins. Co. v. Wilkinson, 13 Wall. 222.

⁵ De Grove v. Metrop. Ins. Co., *supra*. Lipman v. Niagara Fire Ins. Co., 121 N. Y. 454. Sanborn v. Fireman's Ins. Co., 16 Gray, 448. Relief Fire Ins. Co. v. Shaw, 94 U. S. 574.

them, whether he has read the policy or not.¹ The delivery of a policy is not in itself so significant and controlling as the delivery of a deed or ordinary written instrument.²

§ 43. Certain Rules of Construction.—The general rules of law must be invoked to arrive at a proper construction of the insurance contract, but the more important of these rules in their relation to insurance law demand special notice.

(1) The written contract, including almost always the application or survey, if there is one, is the only evidence of what the contract is as to all matters which it purports to cover.³ Thus, for example, a pamphlet or prospectus issued by the insurance company is not admissible in evidence to disturb the terms of the policy, although the insured may have incurred a forfeiture in consequence of reliance upon its representations;⁴ for all prior and contemporaneous negotiations, promises and statements, whether written or oral, become merged in the written contract. That is still ostensibly the rule, but under the doctrine of waiver and estoppel, to be hereafter discussed, as applied to insurance contracts, it may be questioned whether it should not be called the exception rather than the rule.

It is to be observed that the language of the policy is not in all cases conclusively binding and effective; for grounds may sometimes exist for relief in equity. Thus, in a clear case of mutual mistake—that is, where it plainly appears by evidence outside the contract that the real agreement of the parties is not correctly evidenced by the policy—or where there is a mistake on one side and fraud inducing it on the other, the written contract may in a proper case be reformed by equity to correspond with the real agreement.⁵

Similarly, either party may obtain in equity a rescission of

¹ *Allen v. German Am. Ins. Co.*, 123 N. Y. 6. *Monitor Mut. Fire Ins. Co. v. Buffum*, 115 Mass. 343.

² *Xenos v. Wickham*, L. R., 2 H. L. 296.

³ *Ins. Co. v. Mowry*, 96 U. S. 544. *Ins. Co. v. Lyman*, 15 Wall. 664.

⁴ *Fowler v. Metropolitan Ins. Co.*, 116 N. Y. 389.

⁵ *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283. *Harris v. Columbiana County Mutual Ins. Co.*, 18 Ohio 116; s. c., 51 Am. Dec. 448. But judgment on insurance contract is a bar to an action to reform it. *Steinbach v. Relief Fire Ins. Co.*, 77 N. Y. 498; s. c., 33 Am. Rep. 655.

the contract for fraud or mutual mistake with a reinstatement of the parties.¹

But it is important to notice that after a fire or marine loss, or after a loss under a life policy, unless the life policy has run for a large part of its anticipated duration, this form of relief would be unsatisfactory.

(2) A court must not use its discretion to modify the conditions or provisions of the contract entered into by the parties in order to effectuate what it might consider a more equitable arrangement than that resulting from an enforcement of the strict terms of the policy.²

This elementary proposition of law is not peculiar to insurance, but in the construction of insurance contracts it is peculiarly apt to be disregarded by some tribunals.

(3) If there is any inconsistency between the written and the printed words of the policy, the former prevail, because they are framed and inserted with reference to the particular contract, and the parties do not generally take the trouble to revise or alter the formal printed conditions.³

Thus, for example, where a furniture dealer insured his "stock in trade," the written description was held to cover paints, oils, and varnishes used to finish, though in answer to an inquiry it was stated that no explosive or highly inflammable matter was kept on the premises.⁴

In the same way, insurance "as a manufacturer of brass clock works" permits the use of all such articles as are ordinarily employed in that manufacture, and the making of them for that purpose, if such be the ordinary course of the business, although the use of such articles be prohibited as extra-hazardous by the printed terms of the policy.⁵

In an English case where the Lloyd's form of policy was filled up as a time policy on the ship, it was argued from the various clauses not usually struck out, and in this case left standing, referring to a voyage, that certain conditions only

¹ Union Cent. Life Ins. Co. v. Pott-ker, 33 Ohio St. 459; s. c., 31 Am. Rep. 555. La. 66; s. c., 23 Am. Dec. 458. Robertson v. French, 4 East 130.

² Allen v. German Am. Ins. Co., 123 N. Y. 6. ⁴ Haley v. Dorchester Fire Ins. Co., 12 Gray (Mass.), 546.

³ Harper v. N. Y. City Fire Ins. Co., 12 N. Y. 443. ⁵ Bryant v. Poughkeepsie Mut. Ins. Co., 17 N. Y. 200. Nicolle v. Ins. Co., 3

applicable to a voyage policy applied to the ship in the case of the policy, though in terms a time policy; but the court held otherwise, and said: "It has been suggested, that, by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable in a voyage policy to goods as well as to the ship, the policy is something less or something more than a time policy; but the practice of mercantile men writing into their printed forms the terms by which they desire to describe and limit the risk intended to be insured against, without striking out the words which may be applicable to a larger or different contract, is too well known and has been too constantly recognized in courts of law to permit any such conclusion."¹

Hence it is that in the familiar instance of words written in the margin or at the foot of policies, and especially marine policies, such written words are considered as applying indefinitely to the whole of the policy, and as controlling the sense of those parts of the printed policy to which they apply; so that by the word *ship*, or *freight*, or *goods* written in the margin, the general terms of the policy applicable to other subjects besides the particular one mentioned in the margin are considered as narrowed in point of construction to it.²

So it has been held that the words restricting the liability of the insurers "against actual total loss only," written upon the margin, prevail over any inconsistent printed provisions in the body of the policy.³

On the same principle, it is held that the special printed clauses or riders attached to the policy prevail over the more general terms of the ordinary printed form.⁴

(4) If the language of the policy is ambiguous and fairly open to doubt, of which the court is judge, oral evidence is admissible to explain the real meaning of the parties.⁵

(5) Evidence of a general and well-known custom of trade may be received in evidence as within the probable contempla-

¹ Dudgeon v. Pembroke, 2 App. Cas. 284.

² Chadsey v. Guion, 97 N. Y. 333.

³ Burt v. Brewers and Maltsters Ins. Co., 9 Hun. 383; affirmed in 78 N. Y. 400.

⁴ Gunther v. L., L. & Globe Ins. Co., 34 Fed. Rep. 501.

⁵ Daniels v. Hudson River Fire Ins. Co., 12 Cush. 416; 59 Am. Dec. 192.

tion of the parties, provided the custom is not inconsistent with the express terms of the policy, and the language of the policy is not clear.¹ Trade usage plays a particularly important part in the law of marine insurance.

The law of merchants, consisting of certain principles which general convenience has established to regulate the dealings of merchants with each other in all countries, may be considered as a branch of public law. The courts take official cognizance of this where it has been established by a course of decisions. But a particular or local custom must be affirmatively established by evidence and shown to have been known to both parties and within the probable contemplation of the contract.²

(6) The contract of insurance having been framed by the insurers in their interest, and the insured being compelled to accept the form offered in order to secure insurance, any ambiguity as to the intent or meaning of its terms, or what property was intended to be covered, or where situated, will be construed in favor of the insured, and with the purpose of granting him an indemnity for his loss.³

(7) Forfeitures are not favored, and equivocal words or phrases, or provisions repugnant to one another, will be so construed as to give effect to the instrument rather than to avoid it.⁴

The adoption of a standard form of fire policy has not changed the rules of construction previously prevailing in this regard.

The object of the New York statute is declared to be to provide a uniform contract or policy of fire insurance—not to prescribe terms which should seem to the legislature reasonable. When the act was passed, the form of policy had not yet been adopted. Its preparation was left to insurance men, to wit, the New York Board of Fire Underwriters, and by

¹ Glendale Woolen Co. v. Ins. Co., v. *Ætna Fire Ins. Co.*, 61 N. Y. 21 Conn. 19; s. c., 54 Am. Dec. 303. 571.
Mooney v. Howard Ins. Co., 138 Mass. 375; 52 Am. Rep. 277.

² Walls v. Bailey, 49 N. Y. 464. *Phenix Ins. Co. v. Tomlinson*, 125

³ Kratzenstein v. Western Assurance Co., 116 N. Y. 54. *Baker v. Homestead Fire Ins. Co.*, 80 N. Y. 21; s. c., 36 Am. Rep. 570.
Hoffman v. Ætna Fire Ins. Co., 32 N. Y. 405; s. c., 88 Am. Dec. 339. Statutes relieving the insured from forfeiture in certain cases will be found referred to and classified in appendix.

section 3 of the act it is provided that any policy made in terms inconsistent with the provisions of the act shall nevertheless be binding upon the company.¹

§ 44. What Law governs the Construction of the Contract.—Ordinarily the laws and usages of the place where the contract of insurance is made are to be applied in its interpretation and construction.²

This rule is applied because in insurance there may be several places where the contract is operative—one place for the payment of premium; another for the payment of loss, and a third for the location of the subject of insurance. But if the policy provides that the loss and the premiums are to be payable at the home office, the latter place would seem to be the place of performance, and its law to prevail in the construction of the policy.

It is often important to determine by what law the validity and effect of the policy are to be governed, because the statutory provisions relating to the insurance contract vary greatly in the different States.

If the policy provides that it will not be binding until countersigned at a certain agency, the agency is the place of contract. So if the policy is sent to the agent for delivery on receipt of the premium;³ but if the application is accepted at the home office, and the policy mailed from there to the applicant in another State, the home office will be the place of contract.⁴ As a general thing the contract is considered made where the last act necessary to complete it is done.⁵

The standard of seaworthiness of a ship is to be determined by the custom of the port and country to which the vessel belongs, rather than that of the place where the insurance is made.⁶

§ 45. Who Construes the Contract, Court or Jury.—This is an intensely practical question, because a court

¹ L. 1886, c. 488.

² Equitable Life Assur. Society v. Clements, 140 U. S. 226.

³ Thwing v. Great Western Ins. Co., 111 Mass. 93.

⁴ Daniels v. Ins. Co., 12 Cush. 416;

59 Am. Dec. 192. Cook v. Johnson, 3 Dutch (N. J.) 645; 72 Am. Dec. 319.

⁵ Northampton Live Stock Co. v. Tuttle, 40 N. J. L. 476.

⁶ Titania, 19 Fed. Rep. 101.

tries to enforce the contract according to its legal meaning and effect, whereas a jury is apt to consider an insurance an absolute contract of indemnity regardless of conditions, and will almost invariably find for the insured, unless his claim is characterized by some element of dishonesty or bad faith.

The general rule is that the construction of the policy of insurance is a question of law for the court to determine, and warranties, as we shall see hereafter, must be strictly enforced regardless of their materiality; but when the language employed to describe the thing warranted is not free from ambiguity, or when it is equivocal and its interpretation depends upon the sense in which the words are used in view of the subject to which they relate, the relation of the parties and the surrounding circumstances properly applicable to it, the intent of the parties becomes a matter of inquiry, and the interpretation of the language used by them is a mixed question of law and fact. Such a question is to be submitted to the jury under appropriate instructions.¹

If the testimony is undisputed, whether it amounts to a breach of warranty or not is generally for the court.² And if the facts are such that to the average mind only one inference is deducible from them, the court must make a decision as matter of law; but otherwise questions of mixed law and fact properly belong to the jury.³ Thus the question, whether the risk has been increased, whether a man is in good health, whether he is of temperate habits, or has used due diligence, or has exhibited good faith, whether his ship was seaworthy, whether the conduct of a duly authorized agent amounts to a waiver, and kindred issues, are usually for the jury, although the policy contains a warranty in respect to them.

The Connecticut court says: "Extreme cases either way may be easily determined. Between them there is a wide belt of debatable ground, and cases falling within it are governed so much by the peculiar circumstances of each case that it is much better to determine the matter as a question of fact." ⁴

¹ *Kenyon v. Knight Templars*, 122 729. *Appleby v. Astor Fire Ins. Co.*, N. Y. 247. *Northwestern Life Ins.* 54 N. Y. 253.

Co. v. Muskegon Bank, 122 U. S. 501. ³ *Donahue v. Ins. Co.*, 56 Vt. 380.

² *Dwight v. Germania Life Ins. Co.*, ⁴ *Lockwood v. Ins. Co.*, 46 Conn. 103 N. Y. 341; s. c., 57 Am. Rep. 553.

CHAPTER IV.

GENERAL PRINCIPLES—CONTINUED.

Representations and Concealments.

THE contract of insurance is preëminently one requiring good faith between the parties ; and fraudulent dealing at any stage, either before or after the issuance of the policy, is fatal to the rights of the party responsible for it. The principle *caveat emptor* does not apply. The party wishing to effect an insurance is in duty bound to make a frank and honest disclosure of those circumstances which are likely to affect the insurer's estimate of the risk, and particularly is this true in the case of marine insurance, where the means of information are apt to be peculiarly and often exclusively within the reach of the applicant.

Equity requires that the two parties should contract *pari passu*, which can only be the case when the knowledge of the assured is communicated. Hence, the question whether any fact should be communicated depends upon whether it is material, not upon the opinion of the proposer whether it is so. If he is himself ignorant of the material fact, he can of course be under no obligation to disclose it. Otherwise he would no longer contract *pari passu* with the insurers.

.. **§ 46. Concealment : Marine Insurance.**—In marine insurance a concealment of a material fact by a party or his authorized agent, whether innocent or fraudulent, avoids the contract.¹

Thus a policy was effected on goods on board ship or ships from the Canary Islands to London by an agent of the assured,

¹ *Howe Machine Co. v. Farrington, Ins. Co. v. Lloyd*, 10 Exch. 523. 82 N. Y. 126. *Proudfoot v. Monte-Blackburn v. Haslam*, L. R., 21 Q. B. 511. *North British D.* 144 (1838).

who at the time knew that a portion of the goods to be insured was on board the *President*, and also that the *President* had been reported at Lloyd's as at sea, deep and leaky. He did not inform the underwriter that the *President* was one of the ships connected with the proposed risks, so that the underwriter had no means of applying the intelligence existing at Lloyd's. The court held that the suppression of this fact by the assured vitiated the policy, notwithstanding it turned out that the intelligence at Lloyd's was unfounded, the *President* not having been deep or leaky on any part of the voyage insured, and that she was lost not by perils of the seas at all, but by capture which occurred three weeks after the period referred to in Lloyd's "Intelligence."¹

To render the agent's concealment fatal he must be one who is so connected with the business at the time of closing the contract that his concealment can fairly be said to be the act of the principal within the scope of the employment and before the agency is terminated.²

§ 47. Concealment: Fire and Life.—In regard to contracts of life and fire insurance it is generally laid down as the law in this country that the concealment of a material fact, when not made the subject of express inquiry by the insurers, must be intentional to avoid the policy; and this is partly on the ground that insurers have for a long time been in the habit of propounding questions upon all points except those in respect to which they are content to rely upon their own independent means of information, and partly because life and fire policies generally make a multitude of particulars material to the risk.³

But in England the rule is stated as applicable to all kinds of insurance, that the concealment of a material fact, whether intentional or unintentional, will avoid the contract.⁴

Insurers are not generally inclined to press this matter of

¹ *Lynch v. Hamilton*, 3 Taunt. 37. Harmer, 2 Ohio St. 452; s. c., 59 Am.

² *Blackburn v. Vigers*, L. R., 12 App. Dec. 684. *Clark v. Union Mut. Ins. Co.*, 40 N. H. 333; s. c., 77 Am. Dec. 721.

³ *Washington Mills Mfg. Co. v. Weymouth Ins. Co.*, 135 Mass. 503. *Mal-lory v. Travellers Ins. Co.*, 47 N. Y. 52. *Hartford Protection Ins. Co. v.*

⁴ *London Ass. Co. v. Mansel*, L. R., 11 Ch. D. 363. *Moens v. Heyworth*, 10 M. & W. 155. *Carter v. Boehm*, 1 W. Bl. 593; s. c., *Smith's Lead. Cas.*

innocent concealment too far, nor would it be good policy for them to do so; for the rule works both ways, and in reality it might appear that with his profound expert knowledge of the situation the insurer is acquainted with many important facts of a general character bearing upon the risk which he does not trouble himself to disclose to the insured.

Neither party is bound to volunteer information of matters which the other knows, or which in the exercise of ordinary care the other ought to know, and of which the former has no reason to suppose him ignorant, or those of which the other waives communication.¹

Each party is bound to know matters of general intelligence or of public notoriety, including general usages of trade which are open to his inquiry equally with that of the other.² But the insurer is not presumed to know the contents of Lloyd's Lists.³

Matters of mere opinion or belief need not be stated.⁴

Where the insurer makes special inquiries, as by requiring the execution of an application, it may generally be assumed that the information asked for is all that is required.⁵ Other matters relating to the risk, and particulars about the title, not asked for, need not be volunteered.⁶ This, in practice, constitutes an important modification of the general rule requiring a full disclosure of all material facts, inasmuch as a written application is almost invariably made the basis of a life policy, and the fire policy by its own terms provides for certain disclosures; but even then the applicant must evince good faith, and would be guilty of a wrongful concealment if he withheld intelligence which would clearly affect the judgment of the insurer. As, for example, that serious attempts had lately been made to set fire to his house, or that his ship was already in distress.⁷

¹ *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; s. c., 25 Am. Rep. 182. *Armenia Ins. Co. v. Paul*, 91 Penn. St. 520; s. c., 33 Am. Rep. 676. *Ins. Co.*, 2 G. & J. 136; s. c., 20 Am. Dec. 424. ⁵ *Browning v. Home Ins. Co.*, 71 N. Y. 508.

² *Carter v. Boehm*, 3 Burr. 1903.

³ *Morrison v. Universal Marine Ins. Co.*, L. R., 8 Exch. 40.

⁴ *Smith v. The Columbia Ins. Co.*, 17 Pa. St. 253; s. c., 55 Am. Dec. 546. *Allegre's Admrs. v. Maryland*

⁶ *Wytheville Ins. Co. v. Stultz*, 87 Vir. 629 (1891).

⁷ *Green v. Merchants Ins. Co.*, 10 Pick. 402. *Bebee v. Hartford Co. Mut. Fire Ins. Co.*, 25 Conn. 51; s. c., 65 Am. Dec. 553.

So if a person effected an insurance upon a building as a private house, but omitted to mention that its windows overlooked a petroleum store or floor-cloth manufactory, or some other equally dangerous structure, the policy would be void for concealment.¹

§ 48. Representations.—A representation is an oral or written statement of facts or circumstances made at the time of or before the contract relating to the proposed adventure, and upon the faith of which the agreement is made.

A material misrepresentation of fact by a party or his authorized agent, whether innocent and unintentional or fraudulent, avoids the contract. Representations must be substantially complied with.²

Thus positive representations of the day on which the ship has sailed, or will sail, or on which she was last seen in safety; of the kind of armament she is to be fitted out with; the number of men with which she is to be manned, and the nature of the cargo she is to carry—will, if false, avoid the policy, unless the assured can show that the underwriter was in no respect influenced by them.

For example, where an insurance was effected on ship and cargo at and from Genoa to Dublin, the adventure to begin from the loading to clear for the voyage, Lord Mansfield held that these words plainly implied a representation that the vessel had loaded or would load at Genoa; and as it appeared she had not done so, but at Leghorn, his lordship considered the policy void for misrepresentation and concealment.³

So in case of an insurance on goods, where the words “to return five per cent for convoy and arrival” were inserted in the policy, Lord Eldon was of opinion that these words clearly amounted to a representation that it was probable the vessel would sail with convoy; and as it appeared that the assured knew, when the policy was effected, that the ship had actually sailed without convoy, the contract was avoided.⁴

A policy on ship and goods from Nassau to the Clyde was

¹ Wedderburn v. Bell, 1 Camp. 1.

³ Hodgson v. Richardson, 1 W. Bl.

² Smith v. Aetna Ins. Co., 49 N. Y. 463.

211. Continental Ins. Co. v. Kasey,
25 Gratt. 268; s. c., 18 Am. Rep. 681.

⁴ Reid v. Harvey, 4 Dow. 97.

effected on the 18th of June, 1814. The broker showed the underwriters a letter, dated April 2, in which it was stated, the *Brilliant*, the ship insured, "will sail on the 1st of May." In fact, the ship had sailed on the 20th of April, and on the 11th of May had been captured by an American privateer. These facts were wholly unknown to the parties by whom the representation was made, yet it was held that the policy was avoided for misrepresentation.¹

And where a representation was made some time before the ship sailed, to the effect that she was to sail with convoy and a certain armament, Lord Ellenborough held, that, as it had not been substantially complied with, it avoided the policy, though made without moral fraud.²

The insured innocently represented that he had two hundred thousand dollars of other fire insurance upon his property, whereas, in fact, there was only thirty thousand dollars of other insurance: the court was of opinion that this underestimate was material, and that, though unintentional, it would avoid the contract.³

In the last case attention was also called to the fact that the rule against misrepresentations and concealments is more strict in marine than in fire insurance.

§ 49. Mere Opinion not generally Fatal.—Misrepresentations of fact must be distinguished from erroneous expressions of opinion or belief or exaggerated estimates of value. These usually are not fatal, unless made in bad faith.⁴

Where a broker, in proposing an insurance upon certain vessels engaged in the African trade, stated that they were expected to leave the coast of Africa in November or December, when in fact they had all left in May, it was held that this statement having been made without intent to deceive, though material to the risk, was a mere expression of opinion, and that the contract was not void.⁵

And where a broker, employed to effect a policy on goods for a party who had no interest in the ship, represented that

¹ *Dennistoun v. Lillie*, 3 Bligh. P. C. 202.

² *Edwards v. Footner*, 1 Camp. 530.

³ *Armour v. Transatlantic Fire Ins. Co.*, 90 N. Y. 450.

⁴ *Nat. Bank v. Ins. Co.*, 95 U. S. 673.
Barber v. Fletcher, 1 Doug. 306.

the ship, which was then at Lisbon, was to sail in a few days, and the ship did not in fact sail for a month, Lord Ellenborough held that this statement, though material to the risk, but made by the owner of the goods, who had no control over the time of the ship's sailing, must be regarded merely as the expression of a probable expectation, which, as it appeared to have been made *bona fide*, would not avoid the policy.¹

§ 50. Test of Materiality.—The materiality of a concealment or representation of fact depends not on the ultimate influence of the fact upon the risk or its relation to the cause of loss, but on the immediate influence upon the party to whom the communication is made or is due in forming his judgment at the time of effecting the contract. The party thus sought to be influenced is generally the insurance company. Though the loss should arise from causes totally disconnected with the material fact concealed or misrepresented, the policy is void, because a true disclosure of the fact might have led the company to decline the insurance altogether or to accept it only at a higher premium.²

§ 51. Refers to what Time.—The closing of the contract is the time to which a misrepresentation or concealment must be presumed to refer, and any material facts coming to the knowledge of either party pending the negotiations must be communicated, even after the written proposals have been submitted, and the customary methods of rapid transmission of news must be employed.³ Until the completion of the contract, representations may be withdrawn or qualified, but not afterwards without consent.⁴ In England, after the terms of the contract have been virtually settled by the execution of the slip, subsequently acquired knowledge need not be communicated before execution of the policy, although a marine insurance is not valid by their law until the policy is executed.⁵

¹ Bowden v. Vaughan, 10 East, 415.

² Snow v. Mer. M. Ins. Co., 61 N. Y. 160.

³ Curell v. Miss. M. & F. Ins. Co., 9 La. 163; s. c., 29 Am. Dec. 439.

⁴ Freeland v. Glover, 7 East, 462.

⁵ Ionides v. Pacific Ins. Co., L. R., 6 Q. B. 685.

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CHAPTER V.

GENERAL PRINCIPLES—CONTINUED.

Warranties.

§ 52. **What is a Warranty.**—An express warranty is a statement of fact or promise of performance, relating to the subject of insurance or to the risk, inserted in the policy itself, or by reference expressly made a part of it, which must be literally true or strictly complied with, or else the contract is avoided.¹

A representation, as has been observed, is a collateral inducement outside the contract, and need be only substantially complied with; that is to say, if it is immaterial in the judgment of the jury its falsity will not constitute a forfeiture.

The warranty may be inserted in the body, margin, or at the foot of the policy, but it must appear somewhere upon its face.² An indorsement upon the back is not sufficient, unless it is expressly made a part of the contract.³

No-particular form of words is necessary to create a warranty, and it may relate to the past, present, or future. Warranties form the basis of the insurers' obligation, and it is only upon condition of their complete fulfillment that they promise to make payment.

§ 53. **Warranty must be Strictly Performed.**—In case of a condition or warranty, it is of no consequence whether the fact stated or the act stipulated for be material to the risk or not, or whether the insured acted in good faith or not: the warranty must be strictly and literally performed.⁴

¹ Thomson v. Weems, 9 App. Cas. 671. Cushman v. U. S. Life Ins. Co., 63 N. Y. 404. Clark v. Union Mut. Ins. Co., 40 N. H. 333; s. c., 77 Am. Dec. 721.

² Wood v. Hartford Ins. Co., 13 Conn. 544; s. c., 35 Am. Dec. 92.

³ Murdock v. Chenango Co. Mut. Ins. Co., 2 Comst. 210.

⁴ Fitch v. American Popular Life Ins. Co., 59 N. Y. 557.

Thus a broker, in offering a risk to the underwriter, showed the latter his written instructions, which comprised a statement respecting the vessel, that "she mounts twelve guns and twenty men:" in point of fact, the vessel had not this precise force on board; but she had an armament of guns and swivels, with a crew of men and boys, which in both particulars were equivalent to, though not identical with, the force specified. It was held that the statement made to the underwriter, being a representation, was satisfied by the substantial fulfillment, though had it been a warranty nothing less than a strict and literal fulfillment would have sufficed.¹

In another case, the words "in port 20th July, 1776," were written in the margin of the policy. The ship was proved to have sailed on the 18th of July, and Lord Mansfield held this to be a breach of warranty, though the discrepancy of two days might not make any material difference in the risk.²

In another case, the description of the vessel as "the good American ship called the *Rodman*" was held a warranty that the vessel was American.³

So if the insured by his fire policy warrants that there is no other insurance upon the property, the statement, if untrue, will avoid the policy, though made by the insured in ignorance of the fact, and though wholly immaterial in influencing the insurers.⁴ So, also, if he omit to state one of the incumbrances upon his property, in answer to a question in the application calling for them, the policy will be vitiated if the answer is warranted to be full, although the jury find the fact to be immaterial.⁵ And if by his contract of life insurance he warrants that he was not engaged in selling liquor, the validity of the policy will depend upon the truth of the statement.⁶ If, however, the insured warrants that his building is "used for the storage of ice," that may be quite true, although at the time of the commencement of the risk there is no ice there.⁷ Many illustrations of this doctrine will be considered in connection with the clauses of the policies.

¹ Pawson v. Watson, Cowp. 785.

² Bean v. Stupart, Doug. 12 (note).

³ Barker v. Phoenix Ins. Co., 8 Johnson, 307.

⁴ Allen v. German-Am. Ins. Co., 123 N. Y. 6.

⁵ Bowditch Mut. Ins. Co. v. Winslow 3 Gray (Mass.), 415.

⁶ Dwight v. Germania Life Ins. Co., 103 N. Y. 341; s. c., 57 Am. Rep. 229.

⁷ Dolliver v. St. Joseph's Fire and Marine Ins. Co., 131 Mass. 45.

Warranties are in effect made representations by statutory provisions in some of the States, as shown in the appendix.

It ought to be observed, however, that in making practical application of the doctrine of warranty, it sometimes happens that the alleged breach consists in honest errors or misstatements in their character so trivial and irrelevant to the risk as to fall within the rule *de minimis non curat lex*.

The court, perhaps, relied upon this maxim with more regard to common sense and justice than to the letter of the law in the following case, where a vessel was registered as captained by A, in order to comply with the requirements of the registry laws which forbid an alien to register; but in point of fact the vessel was really under the management of another person, B, who was an alien, but a competent and experienced captain, whereas A had had no nautical experience: it was held that the representation of A's captaincy contained in the registry would not avoid the contract.¹

Similarly, in another case, the same court held that a fire policy was not avoided by the existence of a small building within seventy-five feet of the storehouse insured, which did not affect the risk, although the insured had warranted that the storehouse was detached from other buildings by at least one hundred feet.²

§ 54. Inability to Perform the Contract no Excuse.—The inability of the insured to comply with the requirements of his warranties offers no excuse, unless the insurers are in some way responsible for the omission.

The insurers have promised to pay only upon condition that the insured shall fulfill the contract upon his part, not upon condition that he shall find it convenient or possible to do so.³

This rule is applicable to the payment of premiums when made a condition precedent, and also to all the other warranties in the policy. But the requirements of the policy regarding the form and particularity of the proofs of loss, while

¹ Draper v. Com. Ins. Co., 21 N. Y. 378.

³ School District v. Dauchy, 25 Conn.

² Burleigh v. Gebhard Fire Ins. Co., 530. Evans v. U. S. Life Ins. Co., 64 N. Y. 220. Baldwin v. Citizens Fire Ins. Co., 60 Hun. 339 (1891).

imposing an absolute obligation upon the insured to furnish proofs unless the company excuses it, are held to mean only such reasonable proofs as the circumstances of the case will permit.¹

Sickness, insanity, death,² and, according to some authorities, even war³ will furnish no excuse for the violation of a condition in the policy. But the United States Supreme Court and other courts have adopted the rule, that a war overrides the ordinary obligations of the policy, and simply suspends them until the war is terminated. However reasonable this rule may be, considered logically, it is inconvenient and difficult to apply.⁴

Various classes of statutes which have been passed by the legislatures of different States to relieve from technical forfeitures are given in the appendix.

§ 55. Papers Referred to in the Policy.—A statement in a paper merely referred to in the policy is not a warranty; but if the policy, as it almost invariably does, makes the application plan or survey a part of the contract, then the statements of fact therein contained, whether relating to the past, present, or future, become warranties.⁵

§ 56. Statement of Present Use.—A statement of the nature of the present use of the property, if it does not go to the essential nature of the subject of insurance, is not generally considered a warranty of continuance.

For example, in a late case the United States Supreme Court were of opinion that a warranty in a contract of fire insurance, that smoking was not allowed on the premises, if true when the representation was made, would not be broken though the assured or others smoked afterwards on the prem-

¹ Bumstead v. Dividend Mut. Ins. Co., 12 N. Y. 81.

² Thompson v. Ins. Co., 104 U. S. 252. Carpenter v. Centennial Mut. Life Ins. Co., 68 Iowa, 453. Howell v. Knickerbocker Life, 44 N. Y. 277.

³ Worthington v. Charter Oak Life Ins. Co., 41 Conn. 401.

⁴ Semmes v. Hartford Ins. Co., 13

Wall. 158. Cohen v. Mut. Life Ins. Co., 50 N. Y. 610. N. Y. Life Ins. Co. v. Statham, 93 U. S. 24.

⁵ Cushman v. U. S. Life Ins. Co., 63 N. Y. 404. Fitch v. Amer. Popular Life Ins. Co., 59 N. Y. 557; s. c., 17 Am. Rep. 372. Dwight v. Germania Life Ins. Co., 103 N. Y. 341; s. c., 57 Am. Rep. 729.

ises.¹ So also where the policy of insurance described the property insured as being a two-story frame building used for winding and coloring yarn and for the storage of spun yarn, it did not warrant that such building was to continue to be thus used.² But a warranty that a house was of stone when in reality it was partly stone and partly wood, or that the building insured was a dwelling house, or occupied as a dwelling, when in fact it was not, would avoid the policy.³ If the warranty were simply that the house was a dwelling, that would not necessarily mean that it was *occupied* as a dwelling at that time.⁴

In marine insurance the rule is particularly strict that any statement relating to the property insured appearing upon the face of the policy will be regarded as a warranty.⁵

§ 57. Questions unanswered or partially answered.—If a question in the application is not answered at all, or if the answer is not false in any respect, but upon its face is only incomplete, there is no breach of warranty, provided the insurer accepts the application without objection; for, if not satisfied, the company should demand fuller information. So, also, to avoid forfeiture, equivocal answers are construed most strongly against the company, but notwithstanding this, the applicant must answer in good faith and not attempt to evade, conceal or mislead.⁶

§ 58. A Breach avoids though not Connected with the Loss.—Although the breach of warranty or the misrepresentation or intentional concealment of a material fact may not contribute to or cause the loss, nevertheless the policy is avoided, for the risk becomes a different one from that which the insurer undertook to bear.⁷

¹ *Hosford v. Germania Fire Ins. Co.*, 127 U. S. 399.

² *Smith v. Mechanics and Traders Fire Ins. Co.*, 32 N. Y. 399.

³ *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52. *Alexander v. Germania Fire Ins. Co.*, 66 N. Y. 464; s. c., 23 Am. Rep. 76.

⁴ *Browning v. Home Ins. Co.*, 71 N. Y. 508.

⁵ *Thomson v. Weems*, 9 App. Cas. 684.

⁶ *London Ass. Co. v. Mansel*, L. R., 11 Ch. D. 363. *Phenix Life Ins. Co. v. Raddin*, 120 U. S. 183. *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; s. c., 25 Am. Rep. 182. *Carson v. Jersey City Fire Ins. Co.*, 43 N. J. L. 306. *Higgins v. Phoenix Mut. Ins. Co.*, 74 N. Y. 6.

⁷ *Bank of Balston Spa v. Ins. Co.*, 50 N. Y. 45. *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136; s. c., 86 Am. Dec. 362.

§ 59. Breach avoids though only Temporary.—

If a breach of warranty occurs during the life of a policy and continues temporarily only, by the weight of authority and reason it avoids and does not merely suspend the policy,¹ unless the insurer or its duly authorized agents, with knowledge of the forfeiture, revive the contract by some unequivocal act of confirmation; as, for example, by the acceptance of a premium or assessment, or by the delivery of the policy or a renewal receipt, or by an express waiver of the forfeiture by consent.²

§ 60. To avoid Forfeiture, Contract made Severable.—Where several items of property are insured for separate amounts, either at separate rates or for a single premium, and the breach of warranty affects a portion of the items only, then, according to the weight of authority, the contract is severable unless it contains words as in the case of the New York standard fire policy, showing distinctly that the entire contract is to be avoided by the breach.³

§ 61. Void means Voidable.—Though the contract is said to be avoided by the violation on the part of the insured of any of the conditions or warranties inserted for the benefit of the insurers, this means that the contract is voidable at the option of the insurers.⁴

§ 62. Election once made is Final.—If with knowledge of the forfeiture the insurer elects to revive the contract, and evinces his election by an unequivocal and positive act of confirmation, he cannot thereafter insist upon the past breach.⁵

¹ *Kyte v. Commercial Union Ass. Ins. Co.*, 73 N. Y. 459; s. c., 29 Am. Co., 149 Mass. 116. *Fernandez v. Rep.* 184. *Contra Aetna Ins. Co. v. Great Western Ins. Co.*, 48 N. Y. 571. *Resh*, 44 Mich. 55; s. c., 38 Am. Rep. 228. See note at p. 230.

Coffin v. Newburyport Mar. Ins. Co., 9 Mass. 436.

² *Rice v. New Eng. Mut. Aid So.*, 146 Mass. 248. *Weed v. London and L. Fire Ins. Co.*, 116 N. Y. 106.

³ *Schuster v. Dutchess Co. Ins. Co.*, 102 N. Y. 260. *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 459; s. c., 29 Am. Rep. 184. *Contra Aetna Ins. Co. v. Great Western Ins. Co.*, 48 N. Y. 571. *Resh*, 44 Mich. 55; s. c., 38 Am. Rep. 228. See note at p. 230.

⁴ *Shearman v. The Niagara Fire Ins. Co.*, 46 N. Y., 526; s. c., 7 Am. Rep. 330.

⁵ *Masonic Mutual Benefit Asso. v. Beek*, 77 Ind. 203; s. c., 40 Am. Rep. 295.

CHAPTER VI.

GENERAL PRINCIPLES—CONTINUED.

Waiver and Estoppel.

§ 63. **Nature of Waiver and Estoppel.**—**Waiver** is the voluntary relinquishment of a known right.¹ **Estoppel in pais** is the bar which equity raises, in the interest of fair dealing, to prevent the one party from enforcing certain rights which it possesses under the letter of the contract to the detriment of the other party, where, by its declarations, agreement, or conduct, it has induced the other party to rest secure in the belief that such rights have been relinquished.² While waiver, properly speaking, is the voluntary abandonment of a contract right, estoppel includes those cases where an abandonment is inferred or imposed by the court from the nature of the conduct of the party who would otherwise be entitled to the right. The words waiver and estoppel, however, are often used interchangeably by the courts.

The party that generally waives or is estopped in insurance law is the insurer. To support the doctrine of waiver and estoppel it is not necessary that any new or specific consideration be exchanged, because, except for reliance upon the belief induced by the conduct of the insurer in question, it is to be presumed that the insured would have taken out other insurance for his protection; but even in respect to the provisions of the contract to be performed by the assured after loss no new consideration need be shown to sustain a waiver or estoppel.³

§ 64. **What in General constitutes a Waiver or Estoppel.**—Any unequivocal and positive act of the company

¹ Finderson v. Metropole Fire Ins. Co., 57 Vt. 520.

² Prentice v. Knickerbocker Life Ins. Co., 77 N. Y. 483.

³ Union Ins. Co. v. McGookey, 33 Ohio St. 555.

recognizing the policy as valid after a knowledge of its breach, or any act that puts the insured to unreasonable expense or trouble in the justifiable belief that the company still regards the policy as valid, will estop the company from taking advantage of the forfeiture.¹

By the highest authority the rule is stated thus: "Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."²

§ 65. What the Insured seeks to Accomplish by invoking this Doctrine.—As the question ordinarily arises in practice, the insured, when he claims a waiver or an estoppel, is not aiming at a reformation of the policy in equity, nor at a rescission for fraud or mistake, for generally it would be difficult for him to establish good grounds for a reformation in such cases, and after loss a rescission would afford inadequate relief and would not come within the jurisdiction of a jury. Therefore the insured ordinarily brings his action of contract upon the policy, and under the doctrine of waiver and estoppel may be allowed to recover, although upon the face of the written contract, in conjunction with the testimony of his own witnesses, no cause of action is established against the insurers.³

§ 66. The Disturbance of Contract brought about by Parol Testimony.—This fact is of grave import, and upon it turn many of the difficult questions which arise in the application of the doctrine of waiver and estoppel to the insurance contract. Thus, to illustrate: The policy makes the statements of the written application warranties. The written application, vouched for by the insured, contains certain very important representations; for example, it states, perhaps, that

¹ *Viele v. Germania Ins. Co.*, 26 Ia. 9; *s. c.*, 96 Am. Dec. 83. *Titus* *v. Glens Falls Ins. Co.*, 81 N. Y. 410. *Kenyon v. Knights Templar*, 122 N. Y. 263.

² *Rowley v. Empire Ins. Co.*, 36 N. Y. 550. *Van Schaick v. Niagara Fire Ins. Co.*, 68 N. Y. 434.

³ *Ins. Co. v. Eggleston*, 96 U. S. 572.

his age was thirty-five, or that he never had consumption, or that he has taken out no other insurance, but on the trial of the action brought by the insured against the company on its policy the uncontradicted testimony shows that his age was forty, or that he *had* been afflicted with consumption, or that he *had* taken out other insurance. Under the doctrine of waiver and estoppel, however, the plaintiff is permitted to show by oral testimony that the company or its agent, duly authorized, had knowledge of the truth of that which was misstated in the application, and issued the policy in full possession of such knowledge, or that the applicant made a true statement to the company or its representative, and is not responsible for the erroneous answers, which, he tells the jury, were errors of the company's agent in filling up the application. Or, again, the policy says that the contract shall be void if mechanics are employed in making repairs for more than fifteen days at any one time, or if the building remains unoccupied for more than ten days without written consent indorsed on the policy. These warranties are broken; but under the doctrine of this rule of waiver the plaintiff is allowed to testify orally in excuse for the breach of the written contract that, during the life of the policy and before he paid the last premium, he was told by the company or some one of its officials that he was relieved from the contract requirements as to these particulars.¹

The leading case of *Plumb v. Cattaraugus Ins. Co.* is said to have changed the law for New York.² And this was conceded by the New York Court of Appeals in a later case.³ But the doctrine of oral waivers as adopted by New York received the high sanction of the Federal Supreme Court in the *Wilkinson* case, and has met with full approval in almost all of the States.

§ 67. Effect of this Doctrine on the Ordinary Rule of Evidence.—It is often said that the doctrine of waiver and estoppel does not contradict the terms of the policy, and is not repugnant to the rule that the written contract merges all

¹ *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392. *Richmond v. Niagara Fire Ins. Co.*, 79 N. Y. 230. *Ins. Co. v. Wilkinson*, 13 Wall. 222. *Baldwin v. Citizens' Ins. Co.*, 60 Hun. 389.

² *Deweese v. Manhattan Ins. Co.*, 6 Vroom. 374.

³ *Rowley v. Empire Ins. Co.*, 36 N. Y. 550.

prior negotiations. This would be true if the plaintiff should bring his action to annul the contract;¹ but where, as is usual, the action is brought to recover upon the policy, it would seem to be more sensible and accurate to concede, that, so far as this doctrine tolerates parol evidence of knowledge by the insurers prior to the contract of facts at variance with its stipulations, and permits the insured to give his oral version of antecedent negotiations and transactions, it does constitute a substantial departure from the ordinary rule of evidence: for a doctrine which denies all force and effect to an unambiguous clause of a written contract, to all moral intents and purposes, expunges the clause from the contract altogether.²

§ 68. Reasons in Favor of Waiver and Estoppel in Certain Cases.—The policy is prepared in the interest of the insurers. The applicant must take it or nothing. Its conditions are numerous and complex, and often the insured does not receive it until after the contract is closed. Hence he may have no opportunity to compare it with the application. It in fact is not the record of his intent, nor does it sum up his antecedent negotiations with the company, except with respect to those parts of the policy which are in writing.

It would not be consonant with fair dealing to permit an insurer in return for the premium to deliver a pretended contract of insurance, while knowing all the time, from the very threshold of the transaction, that a forfeiture is already incurred by reason of a violation of some printed condition, and that therefore the policy is of no more avail to the insured than a piece of waste paper. Again, it would not be right to hold the insured responsible for errors in the application, where their insertion was the act of the company or its representative, without any concurrent carelessness or fault on the part of the insured, for in such a case the alleged breach of contract really is not the act of the insured at all. Again, where the policy during its life or after loss becomes voidable at the election of the insurers, their unequivocal act of confirmation with knowledge of the forfeiture ought to be taken as conclusive evidence of the exercise of their right of option to

¹ *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 25.

² *Franklin Fire Ins. Co. v. Martin*, 40 N. J. L. 568.

abandon the forfeiture, and to revive and continue the insurance for the benefit of both parties.

§ 69. Reasons against the Doctrine of Waiver and Estoppel in Certain Cases.—The written instrument is supposed to be the final and most truthful evidence of the result of the negotiations, and if not good for that is a meaningless formality. To go outside of it is to encourage falsehood and fraud, and in the adjustment of insurance rates must ultimately result either in disaster to the insurers and their stockholders, or in saddling upon innocent persons in some form the losses caused by unscrupulous claimants, who, if not concluded by the terms of the written contract, will suit their oral testimony to the exigencies of their case. The applicant knows, or ought to know, that the statements in the application, whether right or wrong, constitute all that the home office has before it in estimating and deciding upon the risk, and fixing the rate of premium. He knows, or ought to know, that the insurers have never given any authority to their agent to distort or secrete from them any facts bearing upon this subject; and he knows, or ought to know, that the policy contains the complete and binding provisions of the contract. Under the doctrine of waiver and estoppel it sometimes happens that the insured is allowed to recover upon a policy in spite of the forfeiture which appears upon its face, where, if the facts disclosed for the first time at the trial had been made known to the company in advance, it would have declined the risk altogether. Thus there is sometimes thrust upon the insurers, by a doctrine of law, a contract which they have neither made, nor upon the testimony disclosed at the trial would have made if they had known it. Such a result would seem to be grossly inequitable; but, on the other hand, to allow the admissibility of this doctrine to turn upon a mere speculation as to whether the insurers would or would not have accepted the risk, if they had known the truth, is to make confusion worse confounded. Furthermore, such a course might sometimes be unjust to the assured, if innocent, for meanwhile he may have lost the opportunity of getting other insurance, and may be ignorant of any ground of forfeiture until apprised of it in the course of a law-suit upon the policy.

§ 70. How this Doctrine has operated in Practice.—The doctrine of waiver and estoppel by agents of insurance companies located outside the home office is largely a development of recent years, and covers one of the most perplexing subjects to be found in the law books. It has often fostered the claims of unscrupulous men, it has been fruitful in litigations, and has had a tendency to drive the companies into an illiberal policy in framing their contracts and in adjusting their losses. Such action of the companies has stimulated the courts in turn to adopt a more and more rigorous application of the doctrine against the insurers, and has called forth frequent and varied interference by the legislatures of most of the States. Thus this whole branch of the law has been thrown into confusion and uncertainty.

The cases upon this subject constitute a considerable portion of the law of insurance in the United States, more so than in England, and many of the opinions of our courts of last resort set forth in them are hopelessly at variance with one another. Notwithstanding all this the doctrine is firmly established, and in many of its applications is just and salutary, and when wisely enforced may be consonant with principles which are now thoroughly recognized both here and in England.¹

Upon a careful review of the English and American authorities, Professor Dwight, as one of the commissioners of the New York Court of Appeals, came to the conclusion that the doctrine of waiver and estoppel by parol evidence as applicable to written contracts of insurance is not inconsistent with the general principles of the law.²

§ 71. Cause of the Conflict of Opinion in applying the Doctrine.—The striking divergence of opinion to be found in the reports of American insurance cases upon the subject of waiver and estoppel is not due to indifference or carelessness on the part of the judiciary in developing this important branch of the law, but rather to certain embarrassing peculiarities of fact which appertain to the making and operation of insurance contracts. The insurers being corporations can act

¹ *Morrison v. Universal Marine Ins. Co.*, L. R., 8 Exch. 40. ² *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6. *Pickard v. N. Y. 6.* *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195. *Sears*, 6 Ad. & Ell. 475.

only through agents, and, as was explained in the first or introductory chapter, the powers of these agents are varied and often ill-defined. Very few of them can strictly be called general agents in the sense in which that term is usually understood in the law, though the powers given to agents by American fire companies are apt to be broader than the powers of local agents of English companies in England. The applicant for insurance knows little about the scope of the agent's actual instructions. In making request for fire or life insurance he often signs a voluminous written application which is forwarded to the home office before he sees the policy. The premium, too, is sometimes paid and the contract closed before the policy is delivered. The policy, when received, perhaps gives to the insured a notice, in the form of a stipulation, that the company, after it has taken advantage of its agent's acts, proposes to repudiate *ex post facto* all responsibility for them. The policy states that the agent is to be deemed the agent of the insured in what has already happened, or that no one is to be deemed an agent for the company unless he has a written commission, or that ~~no agent or officer or any representative of the company can waive~~ provisions of the contract except in writing indorsed on the policy. If a life policy, it states, probably, that no payment of premium is valid unless paid in cash, and that no payment of premium can be made except in return for ~~a written receipt~~ signed by some designated officer or officers. Meanwhile the home office may or may not have received the premium. A loss or death insured against may or may not have occurred. The recitals or stipulations in the policy concerning ~~the authority~~ of the agent may or may not correspond with the ostensible authority which the agent was held out by the company to possess before delivery of the policy. They may or may not accord with the actual authority given to the agent by the company, of which, from the nature of things, the best and primary evidence must exist outside the policy. It will readily be seen that the distinctions likely to arise are many and nice; that a conflict of opinion may oftentimes be apparent rather than real, and that it is not safe to take the remarks of a court in one case and apply them recklessly to the varying circumstances of another case, or to jump to the conclusion that the comments of a judge in the course of some particular discussion

are necessarily intended to serve as the enunciation of a general rule. The necessity for such a warning may be well illustrated by reference to three very recent cases, decided within a single year by a court that perhaps has given more successful study and learning to this branch of the law than any other court in the country.

In the case of *Arff v. Sun Fire Ins. Co.*, 125 N. Y. 57 (1890), the court advances the opinion that an ordinary agent of an insurance company has the power to employ clerks empowered to discharge the ordinary business of his agency, and that a waiver of a character which the agent himself could make is to be attributed to him when made by his clerk; that the maxim of *delegatus non potest delegare* does not apply to such a case, and that the knowledge of a clerk of the agent of the company that there was other insurance was the knowledge of the agent of the company, and, therefore, knowledge of the company itself, and sufficient to estop it from taking advantage of a clause in the policy under which, otherwise, the policy would have been avoided.

The real point of the case, doubtless, was that the subagent was believed to have authority emanating by recognition from the company itself to receive notice of other insurance in pursuance of a provision of the policy. The inference ought not to be drawn from this decision that a solemn written contract, which to have any validity at all may perhaps require to be signed by the president and secretary of a corporation, and countersigned by its general agent, is to be placed wholly at the mercy of an irresponsible subagent, who is neither selected, controlled, paid, or discharged by the company; nor must it be inferred from the language of the learned justice who pronounced the opinion of the court, though it is suggestive of such an inference, that insurance companies are to be deprived of the equal protection of the law.

The general rule relating to the authority of subagents and clerks is better stated in the recent case of *Waldman v. North British, &c., Ins. Co.*, 91 Ala. 170, in which it was held that the maxim *delegatus non potest delegare* is applicable to the agents of insurance companies, and that any general discretionary powers granted to an agent, such as waiving or modifying the terms of the policy, cannot be by him transferred to a sub-

agent. That case also, as well as the Arff case, had to do with waiving the clause about other insurance.

In *Wilber v. Williamsburgh City Fire Ins. Co.*, 122 N. Y. 443 (1890), the court says: "It was entirely competent for the parties to agree that a third person participating in the negotiations should, for the purpose of procuring the policy, be deemed an agent of the assured." Such agent "should be deemed the agent of the assured until after the inception of the contract. Whether he thereafter represent the assured is dependent upon actual authority conferred otherwise than by the contract of insurance."

From this language it must not be understood that the court really intended to commit itself unqualifiedly to the proposition that the actual authority of an insurance agent is to be considered as conferred by a policy of insurance, a contract subsisting between the company and a third party, or that a stipulation declaring in effect that all agents in the transaction are to be deemed agents of the assured would be conclusively binding upon the assured until he had seen the policy, and that after he had seen the policy it would not be binding upon him.

Curiously enough, the courts of Pennsylvania and Dakota, and other courts, have adopted as applicable to a similar stipulation in the policy the precise converse of the rule which might seem to be indicated by the case last referred to, and have held that the stipulation or notice of restriction as to agency contained in the policy has no binding force at all until it is received by the insured.¹

In *Kenyon v. Knight Templars*, 122 N. Y. 257 (1890), the court says: "The mere fact that the agent had knowledge or information of the manner the assured was then selling liquors, did not necessarily affect the right of the defendant to assert and make available the defense that there was a breach of warranty, if the answer was untrue. That was provided against by a provision in the contract. The cases in which knowledge of the agent through whom insurance is taken may operate to defeat the right of the company to avail itself of the fact so

¹ *Kister v. Lebanon Mut. Ins. Co.*, 464. *South Bend Toy Mfg. Co. v.* 128 Pa. St. 553. *Eilenberger v. Pro-Dakota F. & M. Ins. Co.*, 20 *Ins. tective Mut. Fire Ins. Co.*, 89 Pa. St. L. J. 871 (South Dak., 1891).

known, at the time it is taken, are those in which there is no application signed by the assured, stating to the contrary of such existing fact, but rest upon a condition expressed in the policy merely. Then it may be presumed that the statement of it in the policy as required by the condition was omitted by mistake or waived. Such is not understood to be the rule when the alleged breach of warranty is founded upon a misstatement by the assured in the application made and subscribed by him."

Here the court seems to think that it does make a difference, after all, whether the insured has had actual or only constructive notice of restrictions upon the agent's power; but, from the language of the court just quoted, it must not be inferred that a mere knowledge of forfeiture, without any positive act of confirmation, as, for example, delivery of policy or receipt of premium, will in any case avail to work a waiver of a breach of the policy;¹ neither must it be inferred that a breach of a warranty contained in a policy may be waived by an agent where the policy says it cannot, but that a breach of a warranty contained in the application forming a part of the policy cannot be waived by any agent, no matter how broad his authority.²

¹ Weed v. London & L. Fire Ins. Co. 116 N. Y. 118; Titus v. Glens Falls Ins. Co., 81 N. Y. 419. N. Y. 315. Tubbs v. Dwelling House Ins. Co., 84 Mich. 646. Follette v. U. S. Mut. Acc. Asso., 107 N. C. 240.

² Ins. Co. v. Norton, 96 U. S. 240. State Ins. Co. v. Gray, 44 Kan. 731. McGurk v. Met. Life Ins. Co., 56 Conn. 528. German Ins. Co. v. Gray, 43 Kan. 497. Steen v. Niagara Fire Ins. Co., 89 Cont'l Ins. Co. v. Pearce, 39 Kan. 396.

CHAPTER VII.

GENERAL PRINCIPLES.

Waiver and Estoppel—Continued.

§ 72. **What cannot be Waived.**—Parties to a contract of insurance made within a State cannot avoid the provisions of a general statute of that State, unless the statute authorizes it.¹

The State has the right to prescribe the conditions on which either foreign or domestic companies may do business within its jurisdiction, and hence may prescribe conditions of the contract with reference to certain particulars, or may establish a standard form of contract.²

A corporation cannot in general do an act *ultra vires* or beyond its corporate powers as defined by its charter, and every one dealing with the corporation is presumed to be cognizant of the nature and extent of such powers.³

Thus if a fire insurance company organized in New York should attempt to make a contract of life or ocean-marine insurance, the contract would be void.⁴

But any directions of the charter as to the internal management of the affairs of the corporation are not in general binding upon outsiders.⁵

Nor are charter provisions binding upon third persons which extend to the directors' discretionary powers to do a certain act; ⁶ as, for example, where, by the regulations of the

¹ St Paul F. & M. Ins. Co. v. Shafer, 76 Iowa, 282. Emery v. Piscataqua F. & M. Ins. Co., 52 Me. 322. Chamberlain v. N. H. Fire Ins. Co., 55 N. H. 249.

² Continental Ins. Co. v. Chamberlain, 132 U. S. 304. Doyle v. Continental Ins. Co., 94 U. S. 535. Reilly v. Franklin Ins. Co., 43 Wis. 449.

³ Jemison v. Citizens Savings Bank, 123 N. Y. 140 (1890).

⁴ Re Arthur Average Assoc., 32 L. T. N. S. 525.

⁵ *In re Athenæum Life Assur. Co.*, 27 L. J. Ch. 829.

⁶ Ernest v. Nicholls, 6 H. of L. Cases, 401.

company, insurance is to be made only to three-fourths of the value of property, but the officers of the company are to decide what is the value.¹

And, in general, for a deviation from the prescribed method of doing a valid corporate act, the corporation will not be discharged from liability to an innocent person, and therefore in such matters of informality or of inaccuracy, directions whether of the charter or by-laws may be waived.²

§ 73. What can be Waived : Stock Companies.—

Any forfeiture or any condition of the policy inserted for the benefit of the insurers, even those stipulations which provide that there shall be no waiver, or that no waiver shall be made except in a certain manner as by writing, or that certain classes of persons shall be deemed to have no authority to waive, may be waived by the insurers through such representatives as in fact have the requisite authority. This is put upon the ground that parties having power to make a contract have power by mutual consent to abrogate or alter it to any extent at their pleasure, unless restrained by statute.³

§ 74. New Subject cannot be Introduced by Waiver.—The doctrine of waiver and estoppel is not to be applied so as to effect a change in the subject-matter of the contract.

Thus if by the terms of the policy a designated house is the subject of insurance, the insured will not be permitted to show by parol that in consequence of the representations or conduct of the insurers another house ought to be substituted.⁴

§ 75. Rule in Massachusetts and New Jersey.—Massachusetts and New Jersey adhere more closely to the doctrine of the common law, and hold that a waiver of a forfeiture

¹ *Jones v. Bangor Mut. S. Ins. So.*, 116 N. Y. 106. *Insurance Co. v. Norton*, 96 U. S. 240. *Messelback v.*

² *In re County Life Assur. Co.*, L. R., 5 Ch. App. 288. *First Bapt. Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305. *Relief Ins. Co. v. Shaw*, 94 U. S. 574.

³ *Weed v. London & L. Fire Ins.* ⁴ *Sanders v. Cooper*, 115 N. Y.

existing at the inception of the contract cannot be established by parol testimony of what transpired at or before the closing of the contract.¹

But in those States also a waiver occurring after the inception of the contract may be shown by parol.² •

§ 76. What can be Waived : Mutual Companies.

—By some courts, especially those of Massachusetts, it has been held that the officers and agents of a mutual insurance company have no authority to waive such of its charter regulations or by-laws as relate to the essential terms of the contract.³

This distinction is put upon the ground that policy holders in a mutual company are members of the company, and that the by-laws are binding upon all, and that the officers and other representatives of the company are special agents appointed to enforce the by-laws and mutual arrangements, and not to disregard them in favor of one of the members as against his associates.

Even in Massachusetts the limitation extends only to provisions that are of the essence of the contract. Technical requirements in regard to the form and the contents of the proofs of loss, or limitation of time to sue, may be waived.⁴

And the tendency among the courts seems to be to deny the distinction between mutual and stock companies altogether, in respect to the power of the officers and agents to waive conditions and estop the company from insisting upon forfeitures; for, as matter of fact, the applicant for insurance rarely knows anything about the charter or by-laws, and could hardly be expected to be acquainted with them at the time of making his application.⁵

¹ *Batchelder v. Queen's Ins. Co.*, 135 Mass. 449. *Deweës v. Manhattan Ins. Co.*, 6 Vroom (N. J.), 366. *v. Shawmut Mut. Fire Ins. Co.*, 4 Allen, 116; s. c., 81 Am. Dec. 689. *Belleville Mut. Ins. Co. v. Van Winkle*, 1 Beasley, 333. *Pitney v. Glens Falls*, 65 N. Y. 21.

² *Oakes v. Manufrs. F. & M. Ins. Co.*, 135 Mass. 248. *Metropolitan Life Ins. Co. v. McTague*, 49 N. J. L. 587. ** Priest v. Citizens' Mut. Fire Ins. Co.*, 3 Allen, 602. *Jennings v. Metropolitan Life Ins. Co.*, 148 Mass. 61.

Carson v. Jersey City Ins. Co., 43 N. J. Law, 300; s. c., 39 Am. Rep. 584. ** McCoy v. Metrop. Life Ins. Co.*, 133 Mass. 85. *Brewer v. Chelsea Mut. Fire Ins. Co.*, 14 Gray, 203. *Mulrey v. Relief Ins. Co. v. Shaw*, 94 U. S. 574. *Kister v. Lebanon Mut. Ins. Co.*,

Universally it is held that the acceptance of an assessment or premium by the home office is a waiver by the company of all former grounds of forfeiture known by it.¹

§ 77. What amounts to a Waiver.—Any unequivocal and positive act by the insurers, or their duly authorized agent, recognizing the policy as valid—as, for example, the receipt of a premium or assessment, the delivery of the policy or a renewal receipt, or the levying of an assessment—constitutes a waiver of all former known grounds of forfeiture, and the company is said to be estopped from setting them up in defense.²

But it is very important to notice that an oral consent or promise made to the insured at or before the execution of the contract, to the effect that he may in future violate the terms of the policy, is not binding, and cannot be shown by parol, because the oral promise becomes merged in the contract.³ Thus an antecedent promise by an agent, that a premium note need not be paid when due, cannot be shown by parol.⁴

An oral consent by the insurers or their duly authorized agent, given to the insured after the execution of the contract, permitting him to deviate from the requirements of the policy, will operate as a waiver if the insured has relied upon it in such a way that he would sustain injury in case the consent were repudiated by the insurers, and no new consideration need be shown to support the waiver. The consent of the insurers may

128 Pa. St. 553. *Conover v. Mutual Life Ins. Co.*, 1 Comstock, 290. *Natl. Mut. Life Ins. Co. v. Raddin*, 120 U. S. 183.

Ben. Assn. v. Jones, 84 Ky. 110. *Mil-² Morrison v. Universal Marine Ins. ler v. Hillsborough Mut. Fire Assur. Co.*, L. R., 8 Exch. 40. *Weed v. Lon-*
Asso., 44 N. J. Equity, 224. *Eilen-* *don & L. Fire Ins. Co.*, 116 N. Y. 106.
berger v. Protective Mut. Fire Ins. *Bevin v. Conn. Mut. Life Ins. Co.*, 23
Co., 89 Pa. St. 464. *Olmstead v.* *Conn.* 244. *Rathbone v. City Fire*
Farmers' Mut. Fire Ins. Co., 50 Mich. *Ins. Co.*, 31 Conn. 194. *Armstrong v.*
204. *Shay v. Natl. Ben. Society*, 54 *Turquand*, 9 Irish C. L. 32. *Jones v.*
Hun. 109. *Stylov v. Wis. Odd Fel-* *Bangor Mut. Life Ins. Co.*, 61 L. T.
lows' Mut. Life Ins. Co., 69 Wis. 224. *N. S.* 727 (1890).

¹ *Rice v. New Eng. Mut. Aid Soc.*,
146 Mass. 248. *Rindge v. New Eng.*
Mut. Aid Soc., 146 Mass. 286. *Mc-³ Walton v. Agricultural Ins. Co.,*
Gurk v. Metropolitan Life Ins. Co., 116 N. Y. 317. *Ins. Co. v. Mowry,*
56 Conn. 528. *Bouton v. Am. Mut.* 96 U. S. 541. *Ins. Co. v. Lyman*, 15
Life Ins. Co., 25 Conn. 542. *Phoenix* *Wall.* 664.
Ins. Co., 104 U. S. 252. ⁴ *Thompson v. Knickerbocker Life*

also sometimes be inferred from their prior course of dealing with the insured.¹

§ 78. Knowledge of Breach: when a Waiver.—

If at the time of closing the contract the insurers have knowledge of the existence of a cause of forfeiture which would invalidate the policy from the time of its inception, they are held, by accepting the premium or delivering the policy, or by any other positive act amounting to an acknowledgment of its validity, to waive the forfeiture.² The reason for this construction is that it would be imputing to them a fraudulent intent to presume that they designed to mislead the insured into the acceptance of a worthless piece of paper instead of a contract of insurance. Massachusetts and New Jersey, however, as has been observed in another connection, have adopted the rule that parol evidence of such knowledge on the part of the insurers or their representatives at the time of effecting insurance is not admissible to disturb the letter of the written contract.³ But the mere knowledge by the insurers of the existence of the breach of contract does not of itself amount to a waiver or an estoppel.⁴

If it did, the company could never take advantage of a forfeiture, for the moment it became aware of it, it would be debarred from insisting upon it. There must exist in addition to a knowledge of the breach some positive act of confirmation, upon which, in connection with the knowledge, a waiver may be predicated, and by force of which the broken contract may be said to be revived.⁵

§ 79. Silence is not a Waiver.—Mere silence on the part of the company after knowledge of a forfeiture by the insured will not operate as a waiver.⁶ Such cases as the Texas

¹ *Spœri v. Mass. Mut. Life Ins. Co.*, 63 Fed. Rep. 752. *Pechner v. Ins. Co.*, 65 N. Y. 195. *Deweese v. Manhattan Ins. Co.*, 366. *Franklin Fire Ins. Co. v. Martin*, 40 N. J. L. 568.

² *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434. ⁴ *Adreveno v. Mut. Reserve Fund Life Asso.*, 38 Fed. Rep. 806.

³ *McCluskey v. Providence Washington Ins. Co.*, 126 Mass. 306. *Bartlett v. Union Mut. Fire Ins. Co.*, 7 Cush. 175. *Putnam Tool Co. v. Fitchburg Mut. Fire Ins. Co.*, 145 Mass. 268. ⁵ *Weed v. London & Lan. Ins. Co.*, 116 N. Y. 118.

⁶ *Adreveno v. Mut. Reserve Fund Life Asso.*, 38 Fed. R. 806. *Titus v. Glens Falls Ins. Co.*, 81 N. Y. at 419.

case, imposing upon the company the burden of affirmative action upon learning of a breach, are clearly unreasonable.¹

The company has not contracted and is not obligated to make search for its policy holders before they present any claim, to inform them that the legal consequences will follow their default. A clear distinction must be made between a positive act of ratification and an omission to act. Silence in such a case cannot be converted into fraud.

§ 80. Proofs of Loss: Technicalities.—Technical requirements as to the form and contents of the proofs of loss, or time of their service, or time for bringing suit, will more readily be held to be waived than essential elements of the contract which more vitally affect the risk.²

§ 81. Denial of all Liability.—A positive denial by the insurer of all liability under the policy relieves the insured of the duty of furnishing proofs of loss or submitting to a personal examination or to an appraisal under the terms of the policy.³

If the insurer declares the policy annulled upon other grounds, the insured need not go to the unnecessary trouble and expense of a further compliance with the terms of the contract intended to supply the insurer with evidence of the nature and extent of its liability.

§ 82. Demanding Proofs of Loss.—If the company, believing or suspecting the existence of a sufficient ground of forfeiture, but desiring in good faith to avail itself of its contract privileges to examine into the claims of the insured, allows or even requests the insured to furnish the usual proofs of loss, this should not be held to amount to a waiver or to an estoppel.⁴

¹ *Morrison v. Ins. Co.*, 69 Tex. 363. *nings v. Metropolitan Life Ins. Co.*, 148 Mass. 61.

² *Searle v. Dwelling House Ins. Co.*, 152 Mass. 263 (1890). *Goodwin v. Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696.

Mass. Mut. Life Ins. Co., 73 N. Y. 480. *Cleaver v. Traders' Ins. Co.*, 40 Fed. Rep. 711. *Eastern R.R. Co. v. Relief Ins. Co.*, 105 Mass. 570. *Jennings v. Metropolitan Life Ins. Co.*, 148 Mass. 61. ³ *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696. ⁴ *Ronald v. Mut. Reserve Ins. Co.*, 23 Abb. N. C. 271; *N. Y. Supreme Court*, by Barrett, J. *Boyd v. Vanderbilt Ins. Co.*, 20 Ins. L. J. 652 (Tenn., May, 1891).

The language adopted by the court in *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, and approved by other courts, and recently by the same court,¹ is too broad. The company ought to be permitted to postpone the exercise of its right of election until it has gained a reasonable acquaintance with the facts. Such an investigation is not inconsistent with an ultimate repudiation of the contract, and the insured cannot complain that he is misled meanwhile into a neglect to take out other insurance. The argument, that the company ought not to put the insured to any further trouble if the contract is to be forfeited, is quite offset by the consideration that a rule of construction ought not to be applied to the contract which may result in depriving the company of some of its contract rights in the event that it shall decide to confirm the contract. If calling for proofs of loss amounted to a waiver of forfeiture, the company, through fear of waiving its rights, might be restricted to such information concerning the character and extent of the loss as it could acquire without any assistance from the insured. The tendency of this would be to induce a reckless settlement of losses, and to encourage fraud and arson on the part of unscrupulous persons, and the inevitable result would be to force the insurers into an illiberal policy in the adjustment of all claims whether honest or dishonest. Calling for the production of books of account in verification of the claim of the assured is not a waiver of a forfeiture according to the California court.²

The New York standard fire policy provides that to require the fulfillment of the provisions of the policy relating to proofs of loss shall not constitute a waiver.

§ 83. Taking Part in Adjustment.—Similarly, if the company sends its adjuster to investigate the facts and to take part in an effort to ascertain the extent and nature of the loss before determining the proper course to pursue, the court ought not to be eager to infer a waiver of forfeiture, although the insured may have been put to some slight trouble or expense in connection with the investigation.³

¹ *Roby v. American Cent. Ins. Co.*, 120 N. Y. 510 (1890).

² *McCormick v. Orient Ins. Co.*, 86 Cal. 260 (1890).

³ *Pettengill v. Hincks*, 9 Gray, 169.

The ultimate disposition of claims against insurance companies must often be submitted to a loss committee or other high official whose consideration and decision of the matter ought to follow rather than to precede the investigation made by the adjuster.

The doctrine of the *Michigan* case, and others like it, is not to be approved.¹

The New York standard policy provides that such acts shall not be deemed a waiver.

§ 84. Company may Defend on other Grounds than those first Named.—For a company to refuse after loss to make payment upon some specified ground of supposed but mistaken exemption from liability ought not to estop it from setting up other grounds of defense in the action.²

The trouble and expense of a law-suit to the unsuccessful litigant constitute an insufficient excuse for depriving the other party of contract rights. Insurance companies are not infallible. Oftentimes by the knavery of the insured they are ignorant of the most material and important facts pertaining to their defense until after the conclusion of a painstaking and expensive investigation. There would seem to be about as much reason for allowing them to make this expense their sole ground of defense as to allow the insured to construct a cause of action out of the expense of the law-suit in which he establishes no right of action.

The language in the *Michigan* and other similar cases is unreasonable.³

§ 85. A Retention of Proofs Waives Defects that might have been Remedied.—For the insurers to retain the proofs of loss or death, without pointing out any objection to their form or contents within a reasonable time, constitutes a waiver of such mistakes and defects in the proofs as the insured could have remedied upon notice. Here is a clear ground of estoppel.⁴

¹ *Liverpool, London & Globe Insurance Co. v. Verdier*, 33 Mich. 138.

² *Castner v. Farmers Mut. Ins. Co.*, 50 Mich. 273.

³ *Keeney v. Home Ins. Co.*, 71 N. Y. 396. *Jennings v. Metropolitan Life*, 148 Mass. 61 (1888).

⁴ *Devens v. Mech. & Traders Ins. Co.*, 83 N. Y. 168.

CHAPTER VIII.

GENERAL PRINCIPLES—CONTINUED.

Waiver and Estoppel by Agents.

INSURANCE companies, being corporations, can act only by representatives or agents. The law of agency in general is applicable to insurance, and in its practical operation in the determination of many of the questions that arise between the parties to an insurance contract or their respective representatives requires no special notice; but when it comes to the doctrine of waiver and estoppel, as arising from the acts and omissions of the agents of the insurers, an attempt has been made by many courts to apply as against insurance companies a more than ordinarily stringent rule of responsibility.

If an employer chooses to do an act through the instrumentality of another, it is fairly the employer's act—*qui facit per alium facit per se*; and though the act is unauthorized, if, upon learning of it, the employer adopts it by confirmation, then the act, together with any benefit accruing therefrom, becomes his own—*omnis ratihabitio retrotrahitur et mandato æquiparatur*. Subordinates ought to work in subjection to the commands of their masters, and seldom are possessed of pecuniary means with which to satisfy the claims of third persons who may have been injured by the conduct of the master's business. The master, therefore, should be responsible for what is done within the scope of the employment—*respondeat superior*; and when the thing which the agent is employed to do has been accomplished, the power of the agent has spent itself and is terminated, and the principal is not answerable for acts thereafter of him who was once his agent—*nemo ex alterius facto prægravari debet*.

It is proper in all cases, that, as between the principal and an innocent third party, the former rather than the latter

should suffer for the misconduct and misrepresentations of the agent, if relating to the business intrusted to him, and within the scope of its natural and reasonable requirements. This is for the reason that it is the principal who selects, controls, and pays his agent, who enjoys the benefits of his services when faithfully rendered, and who alone possesses the power to discharge him if incompetent or unfaithful. But these familiar considerations which underlie the elementary doctrines of the law of agency in all its ramifications are not illustrated with any special force in the relations existing between an insurance company and its agents. Sometimes these agents are brokers acting for the one party or the other as opportunity offers; and usually the so-called local or canvassing agents outside the home office, though in the regular employ of the company, are not exactly in their pay, for they simply retain from the moneys paid by the insured a fixed commission. The interests of the agent are by no means identical with those of the company: for it is for the immediate profit of the agent to close the bargain, whether the proposed risk is a good one or not; and in his feelings and affiliations it often happens that he is quite as friendly towards his neighbors and townspeople who are his customers, as towards the corporation whose central office and whose officers he may never have seen.

§ 86. Ostensible Authority.—If the company holds out its agent to the public as authorized to do a particular act, or to transact a particular kind of business, this carries with it an authority to adopt the ordinary means, and do and say the appropriate things, to accomplish the object for which the agent is employed.¹

To determine the extent of the authority, then, regard must be had not only to the actual instructions given by the principal which are seldom disclosed to the insured, but also to the character of the particular business involved—whether, for example, it be simply that of investigating losses, and reporting to the principal; or whether it be that of soliciting for insurance, superintending the execution of the application

¹ Insurance Co. v. Wilkinson, 13 Wall. 222. Abraham v. Ins. Co., 40 Fed. Rep. 717.

and forwarding it to the home office ; or whether it involve the ampler powers and wider discretions of making and modifying contracts.¹

§ 87. Undisclosed Instructions not binding upon the Insured.—If the natural and ordinary demands of the business actually intrusted to the agent invest him with the power to adopt a certain course of action or representation, the principal is bound thereby, and may not be permitted to show that his undisclosed instructions of a different tenor and effect have been violated by the agent.

Hence, it often happens that an agent has power to bind his principal in flat disobedience of his express instructions.²

For the agent's wrongful or fraudulent acts of commission or omission, and for his material misrepresentations or trickery within the scope of his ostensible authority as thus defined, the company is liable. Thus, where the soliciting agent of a life company, in filling up the application, fraudulently misstated the age of the assured, and filled out a physician's certificate, and forged the name of the examining physician thereto, and while the policy was in his hands for delivery changed the age of the assured as stated therein, so as to show his real age, and then delivered it, and neither the assured nor the company knew anything of these fraudulent acts, it was held, that the company was liable.³

§ 88. Agency to be Determined by the Facts of Each Case.—Who are agents of the company, and whether brokers and agents are the representatives of the insured or the insurers, are questions of fact to be determined by the circumstances of each case.⁴ But, if the facts are undisputed, the relationship of agency is usually a question of law.⁵

¹ *Ins. Co. v. Edwards*, 122 U. S. 457. *Eastern R.R. Co. v. Relief Ins. Co.*, 105 Mass. 570.

² *Ruggles v. Am. Central Ins. Co.*, 114 N. Y. 415 (1889).

³ *McArthur v. Home Life Ass.*, 73 Iowa, 326 (1887).

⁴ *Commercial Ins. Co. v. Ives*, 56 Ill. 402. *Kausal v. Minn. Farmers Mut. Fire Ins. Co.*, 31 Minn. 17. *Insurance Co. v. Wilkinson*, 13 Wall. 222.

⁵ *Allen v. German Am. Ins. Co.*, 123 N. Y. 6.

§ 89. Effect of Stipulations in the Contract itself as to who are, or are not, Agents of the Company.—

Policies of fire insurance frequently contain either one of these two stipulations: (1) That any person, other than the assured, who may have procured the insurance to be taken shall be deemed to be the agent of the assured, and not of the company, in any transaction relating to the insurance; (2) that in any matter relating to the insurance no person, unless duly authorized in writing, shall be deemed the agent of the company.

And life policies often contain a provision, in substance, that agents are not authorized to make, alter, or discharge contracts, or to waive forfeitures, or to grant permits, or to receive for premiums anything but cash.

The effect of such contract provisions has been the subject of so much controversy, and the occasion of so many inharmonious utterances from the bench, that it behooves any one to approach with diffidence the necessary attempt to evolve from them the law.

These stipulations are not illegal or against public policy, and are held to be of some binding force upon the insured, and at least *prima facie* true. Consequently, if true, they are absolutely binding.¹ They have the practical advantage of restricting what otherwise might be a broader ostensible power in the agent; but by the weight of authority they are not conclusively binding, unless true, because the relation of agency is one existing between the company and its agent, and ought to be primarily determined by what has passed between them extrinsic to the policy, inasmuch as the policy is, in respect to that relation, *res inter alios acta*.

A sweeping general clause of this character, in a printed form of policy, does not very closely resemble an agreement between two persons, intelligently and deliberately made, to the effect that a certain designated third person, of whom they know and who is before their thoughts, shall or shall not be regarded as the agent of one or the other of them in what such third person is about to do or has done. Moreover, the terms of the policy are oftentimes settled by the agent himself without conference with the home office; and if the policy is as-

¹ *Merserau v. Phenix Mut. Life Ins. Am. Ins. Co.*, 123 N. Y. 6. *Whited v. Co.*, 66 N. Y. 274. *Allen v. German Germania Fire Ins. Co.*, 76 N. Y. 415.

serted to be in any respect the source of the agent's authority, the answer would seem pertinent, that an agent cannot fix the limits of his own authority. And, again, if the agent is in fact the representative of the company, and has an authority sufficiently broad, he can waive the clause denying his authority as well as any other clause. If such a clause is untrue or insincere, there is certainly no special sanctity attaching to it; on the contrary, this class of provisions in the policy has stirred the antagonism of the courts more than any other of its conditions. And, finally, the significant fact cannot altogether be ignored, that the policy, as a rule, is not executed and delivered to the insured until after the application has been given to the company, and often, in fire and marine insurance, not until after the contract of insurance has been closed and the premium paid.

A stipulation of this character, it may be contended, is (1) a recital of fact, or (2) an agreement to be complied with, or (3) a mutual promise between the insured and the insurers, that the policy shall be the sole evidence of the alleged fact of non-agency. To the third suggestion it is a sufficient answer to say that the clauses of the policies do not so prescribe, and the courts, moreover, do not look with much favor upon attempts by the parties to abrogate by agreement the established rules of evidence.¹

If it is regarded as a recital of fact, such recital is not conclusively binding upon the insured because no sufficient ground of estoppel is shown in favor of the insurers.² The rule in regard to the conclusive effect of recitals even in deeds is restricted to the recital of those particulars which are supposed to have received the deliberate attention of the parties.³

This is not analogous to the case where a party takes a corporate deed executed by an agent therein recited to have due authority, in which case the grantee is not permitted to deny the authority of the agent, because a good ground of estoppel is presented.⁴

¹ *Travellers Ins. Co. v. McConkey*, 127 U. S. 667. *Utter v. Ins. Co.*, 65 Mich. 545.

² 1 Greenleaf on Evidence, § 285.
³ Washburn on Real Estate, p. 109.

³ 1 Greenleaf on Evidence, § 26.

⁴ *Stow v. Wyse*, 7 Conn. 214. *Huntington v. Havens*, 5 Johns. Ch. 23.

If the clause is regarded as a stipulation, neither party ought to violate it; and if the company permits those who are actually its agents, though without a written commission, to solicit insurance for its benefit, and to superintend the execution of applications, and to make representations in its behalf, the insured should be permitted to show these facts by parol, as amounting to a breach of the stipulation on the part of the insurers, if the stipulation is held to have force.

Such a stipulation is not conclusively binding after the inception of the contract, for the reason that the company, in spite of the contract, might, as a matter of fact, after delivery of the policy, change the scope of the authority of the persons employed by it or alter the manner of bestowing authority upon them;¹ and, according to the weight of authority, such a clause is not conclusively binding upon the insured in respect to the negotiations prior to the inception of the contract, because it is to be regarded in its essential nature as a notice to the insured of an alleged fact extrinsic to the policy which should take effect from its receipt, and provided it is true, rather than as a proper provision of the agreement, or one which the insured could fairly anticipate would be incorporated in the policy.²

The sound rule would seem to be that laid down by the United States Supreme Court in a case which has often been cited, I think erroneously, as supporting the proposition that the contract limitation upon the agent's powers is conclusive until after the inception of the contract. The opinion of Mr. Justice Bradley in that case would seem rather to mean that the companies may obtain the advantage of the agency clauses which they have inserted in the general forms of their policies only by acting in accordance with them; and that such clauses are tantamount to a notice, which is not binding unless true, and which may be waived or disregarded by the companies at

¹ *Wilber v. Williamsburgh City Fire Ins. Co.*, 43 Wis. 108. *North Ins. Co.*, 122 N. Y. 443. *Ins. Co. v. Brit. & Mer. Ins. Co. v. Crutchfield*, 108 Ind. 513. *Sullivan v. Phenix Ins. Norton*, 96 U. S. 234.

² *Kister v. Lebanon Mut. Ins. Co.*, 34 Kans. 170. *Planters Ins. Co.*, 128 Pa. State, 553. *Commercial Ins. v. Myers*, 55 Miss. 479. *Boetcher v. Co. v. Ives*, 56 Ill. 402. *Kausal v. Hawkeye Ins. Co.*, 47 Iowa, 253. *Partridge v. Commercial Ins. Co.*, 17 Hun. Minn. 17. *Gans v. St. Paul Fire & 95.*

pleasure.¹ Following a similar view the New York Court of Appeals has unanimously held in a recent case that an agent of an insurance company may be shown to have an actual authority to waive a forfeiture for non-payment of premiums, although the policy itself declare that he has no such authority.² The same principle has lately been held by several courts to be applicable to proceedings antecedent to the closing of the contract, although the application shown to the insured contained a notice of a pretended limitation upon the powers of the agent to waive conditions or alter the written contract.³

So, also, if the agent has in fact an authority broad enough, he may by his acts, if done within the scope of his actual employment, estop the company from claiming that an alleged violation of the letter of the contract really brought about by the agent himself shall constitute a defense.⁴

Certain States, by statute, have adopted the rule that the soliciting agent shall be deemed the agent of the insurers, no matter what the policy provides. Such statutes are constitutional and control the contract, but have the disadvantage of all unreasonably meddlesome legislation.⁵

§ 90. Effect of Stipulations as to the Manner of Exercising Authority.—Where the policy by its terms permits a waiver of its conditions, it generally provides that such waiver shall be made only by written agreement, indorsed upon the policy.

The New York standard fire policy also stipulates that no representative of the insurers *shall be deemed to have authority* to waive in any other manner, except by written agreement, indorsed upon the policy or attached to it.

To provide that a waiver must be evidenced by writing is eminently reasonable and business-like, and full force and effect ought to be given to this clause.⁶

¹ Norton v. Ins. Co., 96 U. S. 234.

² Wyman v. Phoenix Mut. Ins. Co., 119 N. Y. 274 (1890).

³ Tubbs v. Dwelling House Ins. Co., 84 Mich. 646 (1891). State Ins. Co. v. Gray, 44 Kans. 731 (1890).

⁴ Messelbach v. Norman, 122 N. Y. 578 (1890).

⁵ Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304. McConnell v. Iowa Mut. Aid Assn., 79 Iowa 757.

⁶ Hill v. London Assur. Soc., 26 Abb. N. C. 203 (1890); s. c., 16 Daly 120.

But whether this prescribed method of effecting waivers is exclusive, or whether it may itself be waived or disregarded by any representative of the company empowered with actual authority to control the contract in his discretion, is a mooted question.

The Massachusetts court, in a late case, seems to decide that it is exclusive. It uses the following language: "The defendant requested the court to instruct the jury, in substance, that a local agent, with authority to receive premiums and issue policies, had no authority as such to waive the terms and conditions of the policy, or to waive the conditions in the policy which required the written or printed assent of the company to any change in the situation or circumstances affecting the risk. To these instructions the defendant was entitled. They correctly state the law, and were called for by the evidence. An agent to receive premiums and issue policies is not, independently of evidence showing that he has a much larger authority than this, empowered to waive conditions so important that parties have seen fit to incorporate them into their contract. Some additional evidence must be offered to show that he had been held out by the company as possessing such authority, or that the company had so ratified similar acts, or had so conducted itself in regard to his other transactions that the insured was justified in believing that he had such authority. Nor even if the agent had the fullest authority could the conditions of the policy be waived, except in the manner in which they provide for such waiver. A company which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent, has prescribed only a reasonable rule to guard against the uncertainties of oral evidence, and by this the insured has assented to be bound." ¹

Such reasoning as this is very cogent, but it aims a blow at the doctrine of waiver generally, as it has been applied by all the courts to the contract of insurance.

In a later case, on the other hand, the New York Court of Appeals undoubtedly voices the prevailing opinion when it says: "Notwithstanding the provisions of the policy that anything less than a distinct specific agreement, clearly expressed

¹ *Kyte v. Commercial Union Assur. Co.*, 144 Mass. 46 (1887), Devens, J.

and indorsed on the policy, should not be considered as a waiver of any printed or written condition or restriction therein, the court recognize and affirm the law as settled in this State that such condition can be dispensed with by the company or its general agents by oral consent as well as by writing.”¹

Inasmuch as the admitted purpose of a waiver or an estoppel is to subvert the terms of the contract, the New York rule seems to be more in harmony with the principles which underlie the doctrine of waivers generally ; but it by no means follows that this doctrine is altogether independent of the stipulations of the parties. It is an anomalous and exceptional rule of law, established only to prevent injustice or fraud, but is to be qualified by express agreement when fairly and intelligently made.

§ 91. Authority of Officers of the Company.—

Unless restricted by charter or official action of the directors, officers have, in general, authority to make and alter contracts, to waive conditions and forfeitures, to give permits, to cancel policies, to adjust losses and compromise claims in their discretion.

Where a policy of insurance or other instrument emanating from them alone, or from their subordinates, states that neither they nor any other representative of the corporation have any such power, it simply amounts to the contradiction of a rule of law.

Some companies define this matter by official action, of which they ordinarily give notice to those who deal with them.² The Equitable Life Insurance Company, for example, gives notice that certain of its officers, naming them, are the sole representatives of the company authorized to make, alter, and discharge contracts, and waive forfeitures. In that company one of the designated officers, if he had actual authority, could unquestionably waive any clause of the policy, although

¹ Weed v. London & Lancashire Fire Ins. Co., 116 N. Y. 117 (1889), per Brown, J. 625. Pechner v. Phoenix Ins. Co., 65 N. Y. 195.
² Ryan v. World Mut. Life Ins. Co., Co., 89 N. Y. 315. 41 Conn. 168.
 Marcus v. St. Louis Mut. Life Ins. Co., 68 N. Y.

the policy should provide, as does the New York standard fire policy, that no representative of the company had such power; and he could, within the prevailing rule of law, make an effectual oral waiver, although the policy provided that no waivers should be valid unless in writing.¹

§ 92. Authority of Managers.—General managers of foreign insurance companies and of domestic fire or marine companies, with regard to the doctrine of waiver and estoppel, in the absence of express restrictions upon their authority made known to the insured, stand very much in the place of officers.²

§ 93. Authority of Canvassing Agents: Life.—Canvassing agents of life insurance companies, whether the so called general agents or sub-agents, have as a rule, as explained in Chapter I., no express authority to make, alter, or discharge contracts, or to waive forfeitures, or to grant permits. In this regard they are essentially special agents, whether the policy calls them so or not; and there is no reason—though some of the courts do not agree to this—why in the ordinary course of business they should be assumed by those dealing with them to have any such authority, except as described and explained in the following instances.

1. Exception as to first premium.

An agent of a life company who is intrusted with the business of closing the contract by delivering the policy is held to have an implied authority to determine how the premium then due shall be paid, whether by cash or, as is sometimes done, by giving credit, in which case the agent becomes the creditor of the insured, and debtor to the insurer. In that event, though the agent subsequently defaulted and the money never reached the company, the policy would still be binding.³ By the weight of authority the agent is held to have this discretionary power, although the policy in terms denies it; but

¹ Dilleber v. Knickerbocker Life Ins. Co., 76 N. Y. 567. Baldwin v. Citizens Ins. Co., 60 Hun, 389 (1891). Steen v. Niagara Fire Ins. Co., 89 N. Y. 315. Church v. Lafayette Fire Ins. Co., 66 N. Y. 222.

² Eastern R.R. Co. v. Relief Ins. Co., 105 Mass. 570. McGurk v. Metropolitan Life, 56 Conn. 528. Ins. Co. v. Mahone, 21 Wall. 152.

³ Miller v. Life Co., 12 Wall. 286.

this is based upon his possession of the document for purposes of delivery, and his instructions to deliver it, and consequently his power does not extend to subsequent premiums or premium notes.¹

It might, however, be necessary for the insured to give some evidence that such a custom was known and permitted by the company, if the policy expressly denied the agent this power, for it has been held that the soliciting agent has no authority simply by virtue of his position to accept anything but cash;² and of course he would have no implied authority to take in payment personal property, as, for instance, a horse.³

2. Where the application for insurance is filled in by the soliciting agent of the insurer, and true answers of the insured, given orally, to the interrogatories contained therein are erroneously or improperly written by the agent at his own suggestion, without carelessness or fraud or collusion on the part of the assured, the insurer is responsible for the mistake, and is estopped from seeking to convert its own act into a ground of defense against the insured for an alleged breach of contract. In such a case the courts are disposed to hold the company, no matter what the policy or the application may provide to the contrary, on the ground that the act is purely the act of the company, and that an estoppel derives its sanction from a rule of law and not at all from the contract itself, which indeed its ostensible object is to subvert.⁴

If, however, the erroneous statements in the application are the result of fraud on the part of the insured, or collusion with the agent, the equities of the insured are no better than those of the company, and the company is not estopped from insisting upon the letter of the written contract. Thus where the

¹ Critchett v. Am. Ins. Co., 53 Iowa, 404; s.c., 36 Am. Rep. 230. Walsh v. Hartford Ins. Co., 73 N. Y. 5. Life Ass. Co. v. Ward, 17 C. B. 645. Roehner v. Knick. Life Ins. Co., 63 N. Y. 160.

² Raub v. N. Y. Ins. Co., 14 N. Y. State Rep. 573.

³ Hoffman v. John Hancock Mut. Co., 92 U. S. 161.

⁴ Messelback v. Norman, 122 N. Y. 578. Tubbs v. Dwelling House Ins. Co., 84 Mich. 646. Continental Ins. Co. v. Pearce, 39 Kans. 396. O'Brien v. Home Benefit Society, 117 N. Y. 310. Miller v. Phoenix Mutual Life Ins. Co., 107 N. Y. 92. Ins. Co. v. Wilkinson, 13 Wall 223. Continental Ins. Co. v. Chamberlain, 132 U. S. 304.

insured told the agent that he could write the answer as he liked.¹

The Maryland case,² like others of a similar kind, is not to be commended; for the insured in the Maryland case knew that the company was to be misinformed as to his age, and, although he was an ignorant man, the company ought not to have been held responsible for his moral degradation, whether the act of writing the erroneous answer was the act of the agent or not.

If the mistake in the application constituting the alleged breach of warranty occurs because of the omission of the insured to read the application, and he is not reasonably deterred from reading it by affirmative representations of the agent, or by inability through blindness or ignorance, the insured ought unquestionably to be held responsible for the written statements which he has signed as the basis of the contract; and clearly an omission to read the application is *prima facie* carelessness³ on his part.

On this last point, however, the courts have divided, and in many cases it has been held that the company is bound by the act of its agent in writing the mistake into the application, although the error is perfected through the carelessness of the insured in neglecting to read what he signs.

3. If the statements of the application are what the insured intended them to be, and the mistake arose through ignorance of the meaning of the terms employed, which were used at the suggestion of the agent, the insured ought to be held to the written contract, and the policy avoided, if the agent is only an ordinary canvassing agent, although such agent be styled a general agent with power to select sub-agents; for, as we have seen, soliciting agents of life companies are in law nothing but special agents, without authority to alter policies by their representations or promises. They have no right to interpret the terms of the application or the policy. The law determines what the written language means, and an agent who has no

¹ Blooming Grove Mut. Ins. Co. v. McAnerney, 102 Pa. St. 335; s. c., 48 Am. Rep. 209. Lewis v. Phoenix Mut. Life Ins., Co., 39 Conn. 100.

² Keystone Mut. Ben. Asso. v. Jones 72 Md. 363 (1890).

³ N. Y. Life Ins. Co. v. Fletcher, 117 U. S. 519. Ryan v. World Life Ins. Co., 41 Conn. 168.

authority to make a contract has no authority to unmake one by expressing his opinion of its meaning.¹

It must be conceded, however, that in many cases the contrary view has been accepted by the courts; namely, that by allowing any representative, though only a special agent, to take an application for insurance, the company impliedly gives an authority to him to interpret the meaning and effect of the interrogatories contained in the paper, and also of such answers as may be made to them by the applicant: and this view has in certain instances seemed to receive the sanction of judges of the highest eminence. See, for example, the language of Chief-Justice Ruger in the New York case, and of Justice Hunt in the Federal case.²

Whatever may be the sound rule on this point, the companies, in consequence of divers decisions against them, are apt to give an express notice to the insured, in the application or premium receipt, of a restriction upon the agent's authority to interpret or otherwise change the terms of the contract; and by such notice of restriction, if true, the insured will be bound. Thus where in answer to the question contained in the application, "Are you now insured in any other company?" the applicant truthfully stated to the agent that he had certain other insurance, but the agent wrote "No," it was held that the company was not liable; for on the back of the policy was a notice that no agent had the power to bind the company by receiving any representations or information not contained in the application. And this case has lately been affirmed on appeal by the New York Court of Appeals.³ These cases are on the border line, and other courts upon similar facts are disposed to consider the doctrine of waiver as dominating the contract restrictions.⁴ Similarly if the assured knows or has agreed that the agent is a special agent, without

¹ Allen v. German Am. Ins. Co., Fund Life Asso., 54 Hun, 294. Kabok v. Phoenix Mut. Life Ins. Co., 4 123 N. Y. 6. Devens v. Mech. & Traders Ins. Co., 83 N. Y. 168. N. Y. Suppl. 718.

² Miller v. Phoenix Mut. Life Ins. Co., 107 N. Y. 296. N. J. Mut. Life Ins. Co. v. Baker, 94 U. S. 610. ⁴ Tubbs v. Dwelling House Ins. Co., 84 Mich. 646 (1891). Bushaw v. Women's Mut. Co., 8 N. Y. Suppl. 423. Baumgartel v. Prov. Wash. Ins. Co., 61 Hun, 118 (1891).

³ McCollum v. Mut. Life Ins. Co., 55 Hun. 103; s. c., 124 N. Y. 642 (1891). Wilkins v. Mut. Reserve

power of controlling the terms of the contract, the knowledge by such agent of a forfeiture at the time the contract is closed will not bind or estop the company. This is clearly sound.¹ If, however, the agent is in fact a general agent, with authority like an officer of the company to make and modify contracts in his discretion, his interpretation of the questions and answers in the application, if relied on by the applicant, will bind the company, as will also knowledge on his part of a cause of forfeiture at the time the contract is closed.² The Mahone case has been made an authority, but improperly, for the extension of the rule announced in it to cases where the agent had in fact no such extensive authority.

Knowledge by the soliciting agent of facts constituting a ground of forfeiture at the time of the inception of the contract ought not to avail to estop the company, even in conjunction with the receipt of premium or delivery of the policy, unless the agent communicate the knowledge of forfeiture to one having discretionary power to waive the conditions of the contract.

The acquisition of such knowledge does not in any way enlarge the powers of the special agent, though if he already had the authority to alter the terms of the contract it might then become a factor in operating an estoppel. If the knowledge by the special agent of a ground of forfeiture could work an estoppel simply because he was doing something for the company when he acquired it, then the knowledge of his clerk or office boy might accomplish the same result, and the conclusion would be reached that the binding obligation of a solemn written contract may be destroyed by the casual information acquired or said to be acquired by a wholly irresponsible person doing some trivial act for the company without the connivance or knowledge of the company or any of its commissioned agents. Estoppel is a doctrine to prevent fraud. Knowledge to operate as a waiver of contract rights should only be imputable to the company when possessed by some one who is fairly a substitute for the company in the premises.

The reasoning of the Iowa court in *Boetcher v. Hawkeye*

¹ *Kenyon v. Knights Templar, etc.*, *patrick v. Hartford Annuity Co.*, 56 *Asso.*, 122 N. Y. 247. But see *Fitz-Conn.* 116.

² *Ins. Co. v. Mahone*, 21 Wall. 152.

Insurance Company, that the soliciting agent of the company should not be deemed the agent of the assured, though the policy provided that he should be, is weighty; but their conclusion, that knowledge of forfeiture by the special agent should bind the company, is not so satisfactory.¹

This case, however, is only one of a large class, and serves to illustrate the proposition that some of the judges have enforced the doctrine that notice to an insurance agent is notice to the principal in a manner unknown to the general law of agency. There can be no question that some of the courts have gone too far in this direction; and for confirmation of this view the recent and carefully considered opinions of the House of Lords should be consulted.²

A distinction may perhaps be made between the case where it is sought to destroy a condition of the contract altogether by knowledge possessed by the agent, and the case in which the agent is held to be a suitable representative for receiving a notice pursuant to the terms of the policy. In an English case where the policy provided that notice must be given to the directors and their consent obtained for non-residence, and the assignee of the assured gave notice to the local agent of the company that the assured had left the country, and thereafter paid his premiums for several years upon the policy, it was held that the insurers, who had received these premiums in the regular course of business, were liable, although in fact the agent had no authority to give such a permit.³

§ 94. Effect of Stipulations in the Policy in Respect to the Authority of Canvassing Life Agents.

—Where the application gives truthful notice to the insured that the agent of the company has no authority to waive conditions or forfeitures, or where the assured expressly stipulates that the written statements of the application shall be the only statements upon which the contract is made, any errors of the agent in transcribing the answers will not estop the company, except as the assured is able to make out a clear case of estoppel by reason of acts of the agent within the actual scope of

¹ *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253.

² *Wing v. Harvey*, 5 De G. M. & G. 265.

³ *Blackburn v. Vigors*, L. R., 12 App. Cas. 531.

his authority.¹ But where the error in the application was solely the act of the company's agent, the assured being unable to read and having given true answers to the agent orally, it was held that the company could not set up the breach of warranty in defense, although the application contained the warranty that the answers of the applicant were full, complete, and true, whether written by his own hand or not.²

§ 95. Commissioned Agents: Fire.—The commissioned agents of fire insurance companies are more properly general agents, and except as restrictions upon their authority are inserted in the application or policy, or otherwise made known to the insured, they are held to have power to waive conditions and forfeitures.³ This conclusion is based upon the fact that they have authority to make, cancel, and renew contracts, being furnished with blanks for that purpose.

The principles laid down in the last two sections are also applicable to the representatives of fire and marine companies as well as to life.

The fire policy, however—and this is true of the marine policy also—does not ordinarily make the payment of the premium a condition precedent to the validity of the contract, and a general agent may of course extend credit to the insured, or not, as he chooses. The general custom where credit is given is for the agent to do so on his own responsibility. But in case the agent should make default in accounting to the company the policy will nevertheless be valid. And though the policy provide that it shall not take effect until the premium is paid in cash, the general agent has power to waive the provision, and will be held to have waived it if he delivers the policy without enforcing payment.⁴

If at the time of receiving the premium or delivering the policy the general agent has knowledge of a ground of forfeit-

¹ *Ins. Co. v. Wolff*, 95 U. S. 329. ³ *Walsh v. Hartford Fire Ins. Co.*,
Messelbach v. Norman, 122 N. Y. 578. 73 N. Y. 5.
Ins. Co. v. Norton, 96 U. S. 240. ⁴ *Bodine v. Exchange Fire Ins. Co.*,
Wilkins v. Mutual Reserve Fund Life 51 N. Y. 117. *Boehen v. Williams-*
Asso., 54 Hun, 294. *Walsh v. Hart-* *burgh City Ins. Co.*, 35 N. Y. 131.
ford Fire Ins. Co., 73 N. Y. 5. *Walsh v. Hartford Fire Ins. Co.*, 73

² *O'Brien v. Home Benefit Soc.*, 117 N. Y. 11.
 N. Y. 310.

ure already incurred, the company will be held to have waived it, because it would not be right for the company to accept a premium in return for a contract which it knew would be worthless to the other party.¹

A stipulation that the commissioned agent has no authority to waive except by written agreement is binding, unless the insured is able to show that the commissioned agent had an actual authority, either by instructions or recognized practice, to waive orally, and this it is not so easy to do as before the adoption of the standard fire policy.

§ 96. Special Soliciting Agents: Fire.—They have no authority to waive conditions or forfeitures, but only to receive proposals and forward them.² If they are intrusted with the closing of a contract of insurance, and allowed to make a delivery of the policy, it has been held that they have implied authority to determine how the premium shall be paid, and if they give credit the policy will still be binding, though in contradiction to its terms.³

§ 97. Other Special Agents.—A special agent appointed to investigate or adjust a loss has no implied authority to waive an essential condition of the contract or a forfeiture.⁴

The authority of clerks of agents or of insurers is, as a rule, limited to the performance of ministerial and clerical acts, and they are not to be allowed to disturb or alter the terms of the policy, unless such a result is naturally involved in the proper performance of the particular act which they are employed to do.⁵

¹ *Bennett v. North British & M. Ins. Co.*, 81 N. Y. 273. *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434. *Short v. Home Ins. Co.*, 90 N. Y. 16.

² *Tate v. Citizens Mut. Ins. Co.*, 13 Gray, 79. *Lohnes v. Ins. Co. of N. A.*, 121 Mass. 439.

³ *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117. *Boehen v. Williamsburgh City Ins. Co.*, 35 N. Y. 131.

⁴ *Weed v. London & L. Fire Ins. Co.*, 116 N. Y. 106. *Marvin v. Universal Life Ins. Co.*, 85 N. Y. 278.

⁵ *Waldman v. North British & M. Ins. Co.*, 91 Ala. 170.

CHAPTER IX.

GENERAL PRINCIPLES—CONTINUED.

Marine Insurance.

THE law of marine insurance is in so many particulars peculiar to that branch of insurance that it will be convenient to present by themselves some of the principles relating to it. The subjects of insurable interest, concealment, and representations have already been touched upon.

§ 98. What is Marine Insurance.—Marine insurance is an insurance against risks, connected with navigation, to which a ship, cargo, freight, profits, or other insurable interest in movable property may be exposed during a certain voyage or a fixed period of time.

§ 99. Implied Warranties.—There are three warranties which are understood in every contract of marine insurance, and are as efficacious as though they were written upon the face of the policy. These are in respect to seaworthiness, deviation, and the legality of the adventure.

§ 100. Warranty of Seaworthiness.—In every voyage policy upon ship, freight, cargo, or other interest a warranty is implied that the ship is seaworthy at the time of the commencement of the risk.¹ After much discussion it has been settled by the English courts that no warranty of seaworthiness is to be implied in a time policy.² This distinction is placed by those courts upon the ground that the warranty of

¹ Dixon v. Sadler, 5 M. and W. 405. ² Gibson v. Small, 24 Eng. Law and
Richelieu Nav. Co. v. Boston Ins. Co., Eq. 17. Thompson v. Hopper, 34 Eng.
136 U. S. 408 (1889). Walsh v. Wash- Law and Eq. 266. Dudgeon v. Pem-
ington Ins. Co., 32 N. Y. 427. broke, L. R., 2 App. Cas. 284.

seaworthiness attaches, if at all, at the time of the commencement of the risk, and that to imply such a warranty in a time policy, which might begin to run when the vessel was in mid-ocean, would be inconvenient and unreasonable. But if the assured knowingly send the vessel to sea in an unseaworthy condition, and she is lost in consequence thereof, the loss will not be recoverable under the policy, though directly occasioned by a peril insured against, because it resulted from the wrongful act of the assured.¹

In the United States a warranty of seaworthiness is always implied in a voyage policy, but with reference to time policies the decisions of the different courts are not in harmony.

The Connecticut court has decided for that State that no distinction exists between the two classes of marine policies,² but the opinion of the court in that case can hardly be said to have considered or disposed of all the difficulties attaching to such a rule. By the weight of opinion in this country, the warranty is at any rate to be implied in those cases where the vessel insured by the time policy is, at the time of the commencement of the risk, at a port where repairs could be made. This is the conclusion at which the Massachusetts court arrived in an ably considered case, beyond which the court was not willing to commit itself at that time.³ In a more recent case, however, the Illinois court has decided to abide by the English rule.⁴ In a still later case, the Federal Supreme Court uses the following language with regard to this subject: "In the insurance of a vessel by a time policy, the warranty of seaworthiness is complied with if the vessel be seaworthy at the commencement of the risk; and the fact that she subsequently sustains damage, and is not properly refitted at an intermediate port, does not discharge the insurer from subsequent risk or loss, provided such loss be not the consequence of the omission. A defect of seaworthiness arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the in-

¹ Thompson v. Hopper, 6 El. & B. 172, 937.

² Hoxie v. Home Ins. Co., 32 Conn. 21 (1864). So, also, Merchants Mut. Ins. Co. v. Sweet, 6 Wis. 670.

³ Hoxie v. Pacific Mutual Ins. Co., 7 Allen, 211 (1863), by Bigelow, C. J.

⁴ Merchants Ins. Co. v. Morrison, 62 Ill. 242. (1871).

surer from liability for any loss which is the consequence of such bad faith or want of prudence or diligence, but does not affect the contract of insurance as to any other risk or loss covered by the policy and not caused or increased by such particular defect.¹ The effect of this rule, if indeed it was intended to define an *implied* warranty, would seem to make our law in substance not very different from the English law, after all, except in the matter of classification; for, so far as the general obligation of the insured to refrain from misconduct is concerned, the English court was of opinion in one case, that, if a vessel insured under a time policy should sail in an unseaworthy state, and incur loss in consequence of such unseaworthiness, without the intervention of a peril insured against as the direct cause of the loss, such loss would not be recoverable under the policy.² But it would seem that the English classification is better than that of the United States Supreme Court, because the fundamental notion of a warranty is that it imports an obligation of such a character that a breach of it will cause an absolute avoidance of the whole contract irrespective of its relation to the loss.

It is in harmony with the general purpose of insurance to make a contract of insurance, as far as may be, one of absolute indemnity against loss by the specified perils, regardless of unintentional negligence on the part of the assured or his agents, and this doctrine has received the high sanction of the Federal Supreme Court itself.³

The New York court, without however citing any of the late cases, has recently stated the rule in the following words: "In every case of marine insurance by a general policy covering all perils of the sea, where the vessel insured is in port, there is an implied warranty that the vessel is seaworthy at the inception of the policy. It is a condition precedent to the risk, and if the vessel is not seaworthy the policy does not attach. In an action to recover for a loss upon such a policy, where the fact of seaworthiness at the time of issuing the policy is shown, it is immaterial what the vessel's condition is

¹ Union Ins. Co. v. Smith, 124 U. S. 405 (1887), Blatchford, J.

² Orient Ins. Co. v. Adams, 123 U. S. 67 (1887).

³ Fawcus v. Sarsfield, 6 El. & Bl. 192.

thereafter during the voyage, as loss from unseaworthiness is among the perils insured against. The plaintiffs, under such a policy, make out a *prima facie* case by showing seaworthiness at the inception of the risk. But in time policies there is implied a warranty that the vessel will be kept in repair and made seaworthy at all times during the continuance of the risk, so far as that is reasonably possible, and this implied covenant imposes upon the insured the duty of active diligence to keep the vessel in good order and in a seaworthy condition.”¹

This language, probably, must be understood in a sense somewhat similar to that employed by Mr. Justice Blatchford in the case of the *Union Ins. Co. v. Smith*, just cited, for it is not to be supposed that the court could spell out of a policy that insures even against barratry an absolute and continuous warranty obligatory upon the assured and his agents during the voyage and in foreign ports to keep the ship as seaworthy as possible.

Where at the time of the commencement of the risk a ship was not in port, but off on a distant voyage, it was held that the implied warranty of seaworthiness was not applicable.²

§ 101. Seaworthiness is what.—A ship is seaworthy when reasonably fit to perform the services and to encounter the ordinary perils incident to the voyage.³

This requires that the ship on sailing should be tight and staunch in hull, properly rigged and laden, provided with a competent master, a sufficient number of competent officers and seamen, as well as with a pilot when required by law or custom, and with the requisite appurtenances and equipments such as ballast, cables, anchors, cordage and sails; food, water, fuel and lights, and other necessary or proper stores and implements for the voyage.⁴

Her cargo must be properly stowed, and the weight of it not in excess of the vessel's safe carrying capacity.

In the case of an insurance being effected on cargo which is

¹ *Berwind v. Greenwich Ins. Co.*, 114 N. Y. 234 (1889), *Brown, J.* Q. B. 596. *Thebaud v. Phoenix Ins. Co.*, 52 Hun. 495 (1889), by *Van Brunt, P. J.*

² *Jones v. Ins. Co.*, 2 Wall, Jr. 278.

³ *Merchants Trading Co. v. Universal Marine Co.*, referred to in *L. R.*, 9 1 Pet. 170. ⁴ *M'Lanahan v. Universal Ins. Co.*, 9 1 Pet. 170.

of such a nature or so stowed as to render the vessel unseaworthy, it will be no extenuation to show that in case of need the cargo can be readily jettisoned, for the warranty of seaworthiness is to be considered in relation to the subject-matter insured, and cannot be taken to contemplate the destruction of that very cargo which it is designed to protect.¹

Neither the ignorance nor the innocence of the insured will avail to relieve him from the consequence of a breach of the warranty, though all reasonable precautions were taken to secure the seaworthiness of the vessel on sailing, and her unseaworthy condition arose from a latent defect. For an actual fulfillment of the implied condition is indispensable. Upon the same principle, an insurance on cargo is invalidated if the vessel sail unseaworthy, though the assured be ignorant of her state, or powerless to alter it.²

The implied condition of seaworthiness is to be confined to the ship by which the insurance is effected, and cannot be extended to lighters employed to land the cargo.³ There is no implied warranty that the cargo itself is seaworthy.⁴

The standard of seaworthiness required to satisfy the warranty is not uniform in every case, but variable according to circumstances. Thus, if the voyage comprises several distinct stages, each of which requires a different degree of seaworthiness, the warranty will at least be satisfied if the vessel is seaworthy for each stage alone at the commencement of it. For instance, in a policy "at and from," the risk is divisible into two distinct parts, the risk in port and the risk at sea, and a different degree of seaworthiness is required at the commencement of each of these sections. The vessel on sailing must be fit for the voyage, but for the risk to attach in port it is only necessary that she should have arrived there in a state of sufficient seaworthiness to lie in reasonable security until properly repaired and equipped for the voyage.⁵

So where the voyage consists partly of river and partly of

¹ *Daniells v. Harris*, 2 Asp. Mar. L. C. 413.

² *Oliver v. Cowley Park Insurance*, 470.

³ *Lane v. Nixon*, L. R., 1 C. P. 412.

⁴ *Koebel v. Saunders*, 17 C. B. N. S. 71.

⁵ *Parmeter v. Cousins*, 2 Camp. 235. *Haughton v. Empire Marine Ins. Co.*, L. R., 1 Exch. 206.

sea navigation, and requires a different state of equipment for each stage.¹

If the vessel be unseaworthy for any distinct stage of the adventure on entering upon it, the policy, it has been held, will be avoided, and no subsequent loss will be recoverable, though the defect may have been remedied before loss, and the loss have occurred irrespective of it.²

The warranty of seaworthiness in general only attaches at the inception of the risk; so that in the case of an insurance out and home, if the risk be one and indivisible, the starting of the vessel outward in a seaworthy state will satisfy the warranty, and there will be no breach though the vessel should be unseaworthy upon sailing on her homeward passage or from any intermediate port.

The standard of seaworthiness may, also, have a relation to the character of the ship insured, and if an insurer agrees with full knowledge of the facts to insure a vessel incapable, from size or construction, of being brought up to the ordinary standard of seaworthiness, the implied warranty will be satisfied if the vessel is made as seaworthy as her capacity will admit of.³

But, as a rule, the character of the voyage, rather than the purpose for which the ship was originally constructed, must determine the question whether this warranty has been kept.⁴

Where the nationality or neutrality of a ship or cargo is an express warranty, it is implied by the warranty of seaworthiness that the ship will carry the requisite documents to show such nationality or neutrality.⁵

§ 102. Implied Warranty: Deviation.—There is a second implied warranty in marine insurance; namely, that when the voyage contemplated by a policy is described by places of beginning and ending, there shall be no voluntary

¹ *Bouillon v. Lupton*, 33 L. J. C. P. 37.

⁴ *Thebaud v. Phoenix Ins. Co.*, 52 Hun, 495.

² *Quebec Marine Ins. Co. v. Com. Bank of Canada, L. R.*, 3. P. C. 234.

⁵ *Christie v. Secretan*, 8 T. R. 192. *Elting v. Scott*, 2 Johns. 157.

³ *Burges v. Wickham*, 33 L. J. Q. B. 17.

deviation or departure from the course fixed by mercantile usage, and no unreasonable delay in the commencement or prosecution of the voyage.¹

If the course of sailing between the places named is not fixed by mercantile usage, such a course must be pursued as would appear reasonably direct and advantageous to a master of ordinary skill and discretion.²

A deviation is a variation, and not necessarily an increase of the risk insured.³

Where a policy of insurance was effected on a ship, at and from Montreal to Montevideo, and a delay occurred in the arrival of the vessel at Montreal, which, by converting the voyage from a summer into a winter one, materially affected the risk and rate of premium, it was held that the policy would not attach.⁴

An alteration in the vessel's port of destination is fatal to the contract.

If a vessel is insured to several ports of discharge not mentioned by name in the policy, she must visit them in the geographical order in which they occur from the port of departure; but, if the ports are designated by name, they must be visited in the order in which they are mentioned in the policy. It is not, however, essential that a vessel thus insured should proceed to all the ports named. She may go to one or more and omit the rest. But such ports as she does call at must be visited in the order above described, and it is not lawful for her to re-visit any. This rule is binding unless the departure is warranted by recognized usage.⁵

A deviation from the direct course of the voyage insured, though in conformity with usage, will not be covered unless made in furtherance of the adventure to which the policy relates.⁶

¹ *Burgess v. Equitable Marine Ins. Co.*, 126 Mass. 70. *Cranch*, 26. *Snyder v. Atlantic Mutual Ins. Co.*, 95 N. Y. 196; s. c., 47

² *Hearne v. Marine Ins. Co.*, 20 Wall. 488. *Turner v. Protection Ins. Co.*, 25 Me. 515; s. c., 43 Am. Dec. 294. *Reade v. Commercial Ins. Co.*, 3 Johns. 352; s. c., 3 Am. Dec. 495.

³ *De Wolf v. Archangel Mar. Bank & Ins. Co.*, 2 Asp. Mar. L. C. 273.

⁴ *McCall v. Sun Mutual Ins. Co.*, 66 N. Y. 505.

⁵ *Pearson v. Commercial Union Assur. Co.*, L. R., 1 App. Cas. 498.

⁶ *Maryland Ins. Co. v. Leroy*, 7

§ 103. Deviation, when Proper.—A deviation is justifiable, and does not exonerate the insurers, if it is necessitated either by physical or by moral force.¹

Thus a deviation is proper when caused by circumstances over which neither the master nor the owner of the ship has any control, or when necessary to comply with a warranty or to avoid a peril whether insured against or not, or when made in good faith and upon reasonable grounds of belief in its necessity to avoid a peril, or when made in good faith for the purpose of saving human life or relieving another vessel in distress.

If a vessel is forcibly diverted from her course by stress of weather, the compulsion of an enemy in time of war, or the violence of a mutinous crew, such a deviation is excusable. If a vessel put into a port outside the ordinary course for repairs or necessary supplies, or to set her cargo in order, or to procure fresh hands required for the navigation, or if she remain in her port of lading to avoid a capture, or depart from the usual course from the same motive, or, in short, if she commit any deviation the adoption of which is so urgently demanded by the force of circumstances as to become imperative to a reasonable mind, the divergence will not invalidate the policy.

A departure from an ordinary course of the voyage with the object of saving persons whose lives are in jeopardy is allowed on the ground of humanity, but the same immunity will not be extended in favor of a deviation made solely for the purpose of saving property.² A departure to learn whether a port not of destination is blockaded is a deviation.³ Unreasonable delay amounts to a deviation.⁴ In time policies, especially on voyages in inland waters, a deviation from the permitted course has been held to suspend and not to avoid the policy.⁵

§ 104. Illegality.—There is a third implied warranty, that the adventure shall be a legal one both as regards its nature and the mode in which it is prosecuted.⁶

¹ *Burgess v. Equitable Marine Ins. Co.*, 126 Mass. 70.

² *Co. of African Merchants v. British & Foreign Marine Ins. Co., L. R.*, 8 Exch. 154.

³ *Maryland Ins. Co. v. Woods*, 6 Cranch, 29.

⁴ *Audenreid v. Mercantile Mut. Ins. Co.*, 60 N. Y. 482.

⁵ *Wilkins v. Ins. Co.*, 30 Ohio St. 317. *Greenleaf v. St. Louis Ins. Co.*, 37 Mo. 25. *Hennessey v. Manhattan Fire Ins. Co.*, 28 Hun, 98.

⁶ *Redmond v. Smith*, 7 M. & G. 457.

Some authorities say that illegality avoids the contract because of its concealment rather than because it involves any violation of an implied warranty.

Smuggling voyages, trading adventures to an enemy's port, and all other enterprises prohibited by the law of the land or by the law of nations, being illegal, no policy of insurance will be upheld if effected with the intent to cover them; but this prohibition has been held in England not to apply to trading adventures undertaken in violation of the revenue laws of other nations.¹

Smuggling or other illegal conduct by the master or crew, without connivance of the ship-owner, would not suffice to vitiate the contract; for such acts would amount to barratry, which the policy expressly covers.

Policies upon risks which contravene either the statutes enacted to regulate trade and navigation, or the commercial treaties entered into with other countries, are void equally with those which run counter to the revenue laws, subject however to the exception, that, if the adventure can be carried on without violating the law, an illegal act performed in the prosecution of it will not invalidate the policy unless committed by or with the concurrence of the assured.²

Thus in a case where the master of a vessel in the timber trade stowed a portion of the cargo on deck during the winter season, and, contrary to statute, sailed without a clearance certificate that the cargo was below deck, it was held that the illegality did not vitiate the policy, it having been committed without the knowledge or privity of the owner.³

Again, where a ship not licensed by the board of trade to carry passengers did carry them, it was held, that, inasmuch as such carriage was the unauthorized act of the master alone, without the knowledge of the owners, and contrary to their intentions, the policy was not vitiated by it.⁴

There are risks which it is illegal to insure not because they are at variance with the permanent law of the land, but because they are opposed to public policy, especially in times of war.

¹ *Lever v. Fletcher, Park on Ins.*, p. 237.

² *Wilson v. Rankin*, L. R., 1 Q. B. 162.

³ *Wagh v. Morris*, L. R., 8 Q. B. 202.

⁴ *Dudgeon v. Pembroke*, 2 Asp. Mar. L. C. 323.

Such, for example, are insurances effected on behalf of alien enemies, or to cover trading adventures to an enemy's port, which in both cases are wholly void and inoperative.

The case is different with respect to insurances effected upon the property of neutrals against war risks which are not invalid in the neutral country, though the adventure to which they attach may be liable to capture by a belligerent. For instance, in the event of a port being blockaded, a trading adventure by neutrals to run the blockade, though liable to confiscation under the laws of war, is not illegal, and may therefore be made the subject of a valid insurance in the neutral country.¹

As, however, the ordinary risk is much enhanced by such an enterprise, the intention of the assured must be disclosed to the underwriter at the time when the insurance is effected; otherwise the policy will be void on the ground of concealment.

§ 105. Actual Total Loss.—An actual total loss occurs when the subject insured wholly perishes, or its recovery is rendered irretrievably hopeless.²

Thus, for instance, when a vessel founders in a gale, or is captured by an enemy³ and is condemned as a prize. Whenever the thing insured is by the operation of a peril insured against reduced to such a state as to be incapable of use under its original denomination, there is an actual total loss. For example, if a ship is so injured by the perils of the sea as to be incapable of repair, the loss is actual, though her materials survive either in fragments or bound together in the original form. And again, if goods are so badly damaged as to become incapable of use for the purpose intended, there is an actual total loss.⁴

If a ship is sold and so lost to the owner under a decree of a court of competent jurisdiction in favor of salvors and in consequence of a peril insured against, it is an actual total loss, and therefore the person insured is entitled to payment without notice of abandonment.⁵

¹ Arnould on Insurance, p. 640.

⁴ Roux v. Salvador, 3 Bing. N. C.

² Carr v. Insurance Co., 109 N. Y. 281. Great West. Ins. Co. v. Fogarty, 19 Wall. 640.

³ Rhinelander v. Ins. Co., 4 Cranch, 29.

⁵ Cossman v. West, L. R., 13 App. Cas. 160.

An insurance confined in terms to a total loss covers a loss which deprives the insured of the possession at the port of destination of the entire thing insured, or which renders it entirely worthless, and also covers a general average loss.¹

§ 106. Constructive Total Loss.—A constructive total loss occurs when the subject insured, though still existing *in specie*, is justifiably abandoned on account of its destruction being highly probable, or because it cannot be preserved from actual total loss unless at a cost greater than its value would be if such expenditure were incurred.²

The right to an abandonment is to be determined by the situation at the time of abandonment.³

To exist *in specie* is to be capable of utilization as the thing insured. The difference between an actual and a constructive total loss is that in the former case the loss of the thing insured to the owner thereof is ascertained and permanent, while in the latter case it is inferential or temporary.⁴ For instance, where a ship is so damaged as to be incapable of repair, the loss, as we have already seen, is actual; but, where the damage is susceptible of repair only at a cost exceeding the value of the ship when repaired, the loss is constructive.

Again, where the vessel founders in deep water, so as to leave no reasonable hope of recovery, the loss is actual; but where the vessel sinks in shallow water, so as to admit of a reasonable hope of raising and restoring her only at a cost exceeding her value when raised or restored, the loss is constructive.

Upon the same principle, where goods are so damaged by sea perils that they cannot be brought to their destination *in specie*, the loss is actual; but where, though damaged, it is possible to bring them to their destination *in specie* only at a cost exceeding their value when so brought, the loss is constructive.⁵

¹ Mayo v. India Mut. Ins. Co., 152 Mass. 173 (1890). Benson v. Chapman, 6 M. & G. 810. Chadsey v. Guion, 97 N. Y. 333. ⁴ Maggrath v. Church, 1 Caines, 196; s. c., 2 Am. Dec. 173.

² Hugg v. Augusta Ins. & Banking Co., 7 How. (U. S.), 595. Ins. Co. v. Fogarty, 19 Wall. 640. ⁵ Irving v. Manning, 1 H. L. Cas. 304. Rodocanochi v. Elliott, 2 Asp. Mar. L. C. 399. Aranzamendi v. La. Ins. Co., 2 La. 432; s. c., 22 Am. Dec. 136. Rosetto v. Gurney, 11 C. B.

³ Orient Ins. Co. v. Adams, 123 U. S. 67.

§ 107. Constructive Total Loss: United States.—

In the United States a somewhat arbitrary rule has been adopted in order to make it easier to determine whether the insured is entitled to claim a constructive total loss. It is here held that a person insured by a contract of marine insurance may abandon the thing insured, or any particular portion thereof separately valued by the policy or separately insured, and recover for a total loss thereof in the following cases: (1) If more than half thereof in value is actually lost or would have to be expended to recover it from the peril; (2) if it is injured to such an extent as to reduce its value more than one-half; (3) if the thing insured being a ship, the contemplated voyage cannot be lawfully performed without incurring an expense to the insured of more than half the value of the thing abandoned or without incurring a risk which a prudent man would not take under the circumstances; or (4) if the thing insured being cargo or freight, the voyage cannot be performed nor another ship procured by the master within a reasonable time and with reasonable diligence to forward the cargo without incurring the like expense or risk: but freight cannot be abandoned unless the ship is also abandoned.¹

With respect to freight, in case it is impossible to earn that subject owing to a total loss of ship or cargo, the loss is actual and can be recovered without notice of abandonment. Where, however, the loss though probable is not ascertained, but depends upon chances of recovery or estimated expenditure, the claim falls within the category of constructive total loss, and requires the same kind of proof as in the case of similar claims upon ship or cargo.²

Thus if the ship be damaged so far as not to be worth repairing, but cargo which was on board be saved under circumstances which leave it doubtful whether such cargo might or might not be forwarded in a substituted ship, or if the cargo be lost and the ship may or may not earn some freight by carrying other goods on the voyage insured, in order to make certain of his right to recover as for a total loss on the policy on freight

¹ *McConochie v. Sun Mut. Ins. Co.*, v. *Adams*, 123 U. S. 67. *DePeyster* 26 N. Y. 477. *Bradlie v. Md. Ins. Co.*, v. *Sun Mut. Ins. Co.*, 19 N. Y. 272. 12 Pet. 378. *Peele v. Merchants Ins.* ² *Hubbell v. Great West. Ins. Co.*, *Co.*, 3 *Mason*, 27-85. *Orient Ins. Co.* 74 N. Y. 246.

the assured should give notice of abandonment of the chance of earning such substituted freight.¹

The same rule will apply in case the contract of affreightment is justifiably terminated by a delay resulting from the operation of the perils insured against. Thus a ship which was bound from Liverpool to Newport, where she was to load a cargo of iron rails for San Francisco, got ashore in Carnarvon Bay, and although ultimately floated and repaired was detained for so great a length of time in consequence of the accident that the charterers threw up the charter and hired another vessel to carry the rails which were wanted for the construction of a railway to their destination.

In an action by the assured on the policy of insurance to recover for a loss of the chartered freight, the jury found that the time necessary for getting the ship off and repairing her was so long as to put an end, in a commercial sense, to the speculation entered into by the ship-owners and the charterers; and upon this finding it was held by the Exchequer Chamber, affirming the decision of the court below, that, the adventure having been frustrated by perils of the seas, there was a constructive total loss within the policy for which the assured was entitled to recover.²

§ 108. Notice of Abandonment.—Whenever a claim is made for a constructive total loss, a timely notice of abandonment by the assured to the underwriters is a condition precedent to the right to recover, unless the assured is excused from the obligation to give notice of abandonment by the circumstances of the case.³

The only occasion in which notice of abandonment is not necessary is where, at the time the assured elects to treat the claim as one of constructive total loss, there is no possibility of the underwriter deriving any advantage from such notice, either because there is nothing to abandon or because the

¹ Rankin v. Potter, 2 Asp. Mar. L. v. Mass. Fire & Marine Ins. Co., C. 67. 2 Pick. 104; s.c., 20 Am. Dec.

² Jackson v. Union Marine Ins. Co., L. R., 10 C. P. 125. Allen v. The

³ Kaltenbach v. Mackenzie, 4 Asp. Mercantile Mutual Ins. Co., 44 N. Y. Mar. L. C. 39. McConochie v. Sun 437; s. c., 4 Am. Rep. 700. Clark Mut. Ins. Co., 26 N. Y. 477.

disposal of the property was justifiably determined before the opportunity to give notice occurred. For instance, where the news of the loss of the ship and of her sale reached the assured at the same time, it was held that the underwriters were liable for a total loss without notice of abandonment;¹ and the same conclusion was arrived at under similar circumstances in an action upon a policy of insurance on cargo.²

In all other circumstances, however, the giving of a notice of abandonment is a necessary preliminary to a right to recover for a constructive total loss.

There is a difference between an abandonment and a notice of abandonment. If a marine insurer pays for a loss as if it were an actual total loss, it is held in England that he is entitled to whatever may remain of the thing insured or its proceeds or salvage as if there had been a formal abandonment.³

A notice of abandonment is a notification by the assured to the underwriters that he elects to treat the case as one of total loss made while the happening of the loss is prospective.

An abandonment must be made within a reasonable time after information of the loss, and after the commencement of the voyage, and before the party abandoning has information of its completion. It is reasonable that the assured should, on deciding to claim for a total loss, promptly give notice of his intention to the underwriters in order that the latter may be given the opportunity to take any steps which they may deem advisable for the recovery of the property or for the realization of salvage if the property is recoverable. No specific form is necessary for giving notice of abandonment, nor is it essential that it should be made in writing, though it is customary and advisable so to give it. But the abandonment tendered must be neither partial nor conditional.⁴

§ 109. Effect of Abandonment.—The abandonment, if accepted by the underwriters, or if justified by the facts of

¹ *Farnworth v. Hyde*, 2 Mar. L. R. 187 and 429.

² *Stewart v. Greenock Mar. Ins. Co.*, 2 H. L. Cas. 183.

³ *Roux v. Salvador*, 3 Bing. N. C. 266.

⁴ *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. 450; s.c., 22 Am. Dec. 337.

the case, is equivalent to a transfer of his interest by the insured to the insurer with all chances of recovery and indemnity.¹

An acceptance of an abandonment is not to be presumed from the mere silence of the insurers upon receiving the notice, but may be inferred from their acts as well as their words,² as where the insurers take possession and do not return within a reasonable time.³

If the insurers accept the notice of abandonment, the rights of the parties are fixed by the acceptance, and neither of them can draw back, whatever may be the event.⁴

If an insurer refuses to accept a valid abandonment, he is liable as upon an actual total loss, deducting from the amount any proceeds of the thing insured which may have come to the hands of the insured.

After an abandonment, acts done in good faith by those who were agents of the insured in respect to the thing insured subsequent to the loss are at the risk of the insurer and for his benefit.

A freight earned previous to the loss belongs to the insurer thereof, but freight subsequently earned belongs to the insurer of the ship.⁵

Whenever a loss is paid, whether total or partial, the underwriter who has paid it acquires a right by subrogation to whatever may be recovered by the assured from third parties with respect to the loss; but in the absence of an abandonment the right is limited to the recovery by the underwriter of the sum which he has paid.⁶

This right of subrogation, which in the case of partial loss operates merely to the extent of his loss, is made absolute by abandonment, so that the insurer is entitled to whatever may be recovered with respect to the thing insured, though it exceed the amount paid by him.⁷

If there are several underwriters, they share in the transfer of the interest in proportion to the amount of their several

¹ *Eagle v. Bucher*, 6 Ohio St. 295 ; s.c., 67 Am. Dec. 342.

² *Provincial Ins. Co. v. Leduc*, L. R., 6 P. C. 224.

³ *Copelin v. Ins. Co.*, 9 Wall. 461.

⁴ *North West. T. Co. v. Continental Ins. Co.*, 24 F. R. 171.

⁵ *Stewart v. Greenock Mar. Ins. Co.*, 2 H. L. Cases, 159.

⁶ *Burnand v. Rodocanachi*, L. R., 7 App. Cases, 339.

⁷ *North of England Iron Steamship Ins. Asso. v. Armstrong*, L. R., 5 Q. B. 244.

subscriptions.¹ By an abandonment the insurer can have no greater rights than the insured had.²

§ 110. Measure of Indemnity.—A marine insurer, as has been previously stated, is liable upon a partial loss only for such proportion of the amount insured by him as the loss bears to the value of the whole interest of the insured in the property insured.³ But in a valued policy the value of the interest is agreed upon in advance, and is conclusive in the absence of fraud.⁴

Where profits are separately insured in a contract of marine insurance, the insured is entitled to recover in case of loss the proportion of such profits equivalent to the proportion which the value of the property lost bears to the value of the whole.

§ 111. Valuation Apportioned.—In case of a valued policy of marine insurance on freight or cargo, if a part only of the subject is exposed to risk the valuation applies only in proportion to such part.⁵

Where profits are valued and insured by a contract of marine insurance, a loss of the profits is presumed from a loss of the property out of which they were expected to arise, and the valuation of the policy fixes their amount.⁶

§ 112. Loss under an Open Policy.—A loss under an open policy of marine insurance is ascertained as follows: (1) The value of a ship is its value at the beginning of the risk, including all articles or charges which add to its permanent value or which are necessary to prepare it for the voyage insured. (2) The value of cargo is its actual cost to the insured when laden on board; or, where that cost cannot be ascertained, its market value at the time and place of lading, adding the charges incurred in purchasing and placing it on

¹ *Stewart v. Greenock Mar. Ins. Co.*, 2 H. L. Cases, 188.

² *Delaware Mut. Safety Ins. Co. v. Gossler*, 96 U. S. 645.

³ *Lamar Ins. Co. v. McGlashen*, 54 Ill. 513; s. c., 5 Am. Rep. 162.

⁴ *Griswold v. Union Mut. Ins. Co.*, 3 Blatch. 231. *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77.

⁵ *Davy v. Hallett*, 3 Caines, 16; s. c., 2 Am. Dec. 241.

⁶ *Patapsco Ins. Co. v. Coulter*, 3 Peters, 222.

board, but without reference to any losses incurred in raising money for its purchase, or to any drawback on its exportation, or to the fluctuations of the market at the port of destination, or to expenses incurred on the way or on arrival. (3) The value of freight is the gross freight exclusive of primage, without reference to the cost of earning it.¹

And in each case the cost of insurance is to be added to the value then estimated.

§ 113. Damaged Cargo.—If cargo insured against partial loss arrives at the port of destination in a damaged condition, the loss of the insured is deemed to be the same proportion of the value which the market price at that port of the thing so insured bears to the market price it would have brought if sound.²

§ 114. Labor and Expenses.—A marine insurer is liable for all the expenses attendant upon a loss which forces the ship into port to be repaired; and, where it is agreed that the insured may labor for the recovery of the property, the insurer is liable for the expenses incurred thereby, such expense in either case being in addition to a total loss if that afterwards occurs.³

§ 115. Liable for General Average Losses.—A marine insurer is liable for a loss falling upon the insured through a contribution in respect to the thing insured required to be made by him toward a general average loss called for by the peril insured against.⁴

§ 116. Insured may Claim whole Loss from Insurer, leaving Latter to enforce General Average Contribution.—Where a person insured by a contract of marine insurance has a demand against others for general average contribution, he may claim the whole loss from the

¹ *Stevens v. The Columbian Ins. Co.*,

3 *Caines*, 43; s. c., 2 *Am. Dec.* 247.

2 *Pars. Mar. Ins.*, 406-412.

² *Lamar Ins. Co. v. McGlashen*, 54 *Ill.* 513; s. c., 5 *Am. Rep.* 162.

³ *Orrok v. Commonwealth Ins. Co.*,

21 *Pick.* 456; s. c., 32 *Am. Dec.* 271.

⁴ *Dunham v. Commercial Ins. Co.*,

11 *Johns.* 315; s. c., 6 *Am. Dec.* 374.

insurer, subrogating him to his own right of contribution; but no such claim can be made upon the insurer after the separation of the interests liable to contribution, nor when the insured, having the right and opportunity to enforce contribution from others, has neglected or waived the exercise of that right.¹

§ 117. One-third off New for Old.—In the case of a partial loss of a ship or its equipments, the old materials are to be applied toward payment for the new, and a deduction of one-third from the cost of repairing or replacing the damage is made after deducting the value of the old materials, and the marine insurer is liable for the two-thirds of the cost of the repairs.²

But certain exceptions to this rule are allowed by custom, and as inserted in the policies the rule is generally modified in certain particulars.

Anchors, cannon, and sometimes other articles which are supposed to incur no depreciation in value up to the time of loss are allowed for in full; for metal sheathing a deduction of one-fortieth from the expense of repairing or replacing (after first deducting the value of the old metal and nails) is generally made for every month since the vessel was last sheathed until the expiration of forty months, after which time the cost of remetaling or repairing the same is borne by the assured.

The deduction of one-third off new for old does not generally apply in England in the case of a new ship on her first voyage, and a deduction of one-sixth is sometimes applied to chain cables.³

It is difficult to give an authoritative definition of the extent of a first voyage, and this may be explained by mercantile usage. The charter party may be so worded as to make the outward and homeward passage only one voyage.⁴

This point is sometimes regulated by special provisions of the policy.

¹ *Maggrath v. Church*, 1 Caines, Johns. 315; s. c., 6 Am. Dec. 374. 196; s. c., 2 Am. Dec. 173.

Orrok v. Commonwealth Ins. Co., 21

² *Eager v. Atlas Ins. Co.*, 14 Pick. Pick. 456; s. c., 32 Am. Dec. 277.

141.

³ *Fenwick v. Robinson*, 3 C. & P.

⁴ *Dunham v. Com. Ins. Co.*, 11 323.

CHAPTER X.

GENERAL AVERAGE: MARINE.

THIS subject belongs more properly to admiralty law than to insurance; but it is so intimately connected with insurance adjustments, and with the rights of the contracting parties under a policy of marine insurance, that it cannot well be altogether omitted.

§ 118. **General Average.**—The rule of general average has its basis in the community of interest existing between the owners of ship and cargo, by reason of which losses intentionally incurred for the common safety ought to be equitably apportioned among the interests thereby benefited.

General average is a contribution made by the parties to a marine adventure to defray the cost of extraordinary expenses or sacrifices incurred for the preservation of the ship and cargo. The distinction between a general and a particular average lies in the fact that in the former case there is a general distribution of the loss among the parties to the adventure, while in the latter case there is a special application of the loss to one or more of the parties. Every partial loss is particular average in relation to the party who first sustains it, whether that loss is ultimately to be made good by a general contribution or to remain where it falls. The right to general average and its co-relative obligation are not founded necessarily upon contract, but arise from the common law of the sea, which is applicable to all who are engaged in maritime commerce.¹

The earliest trace of this ancient rule of maritime law is to be found in an extract from the Rhodian law which was incorporated in the Roman civil law. Thence it found its way into the common law of England, and became an implied

¹ Burton v. English, L. R., 12 Q. B. D. 218.

term both in the contract of affreightment and the policy of marine insurance.

§ 119. General Average Losses.—A carrier by water may in case of extreme peril to the ship and cargo, when it is necessary for the safety of the adventure, throw overboard any or all of the cargo or appurtenances of the ship, or otherwise sacrifice the whole or any part of the cargo of the ship, or incur expenses for such purpose.¹

Thus goods or parts of the ship may be cast away to save the ship from foundering in a storm, or to float her when stranded, or to facilitate her escape from an enemy.

Throwing property overboard for such purpose is called jettison; and the loss caused thereby, or by any other sacrifice or expense voluntarily made for such a purpose, is called a general average loss, and is the subject of general average contribution by the interests (whether ship, cargo, or freight) which are thereby saved.²

If the jettison is successful at the time, and the ship continues on her course but is afterward wrecked, whatever is saved from the wreck must contribute to the original jettison; but if the goods jettisoned be afterward recovered, and the ship proceeding on her course be afterward lost, the goods need not contribute toward the loss of the ship.

In the case of general average expenses properly incurred under the circumstances as then existing, it has been said that the ratable contribution is due from the different interests intended to be benefited, whether the experiment ultimately results in a benefit or not; and on principle it would seem as though this were the better rule to apply to all such justifiable sacrifices made for the common benefit.³

A jettison must be made in good faith and with prudence, and ought, so far as possible, to begin with the most bulky and least valuable articles. But of necessity the master of the ship must be left free to take such steps as he deems necessary for the preservation of the interests intrusted to his care.

¹ *Sweeney v. Thompson*, 30 Fed. R. s. c., 86 Am. Dec. 375. *Seudder v. 121. Hobson v. Lord*, 92 U. S. 397. *Bradford*, 14 Pick. 13; s. c., 25 Am. *Star of Hope*, 9 Wall. 203. Dec. 355.

² *Harris v. Moody*, 30 N. Y., 266; ³ *Spofford v. Dodge*, 14 Mass. 66.

In early times the performance of a general average act was usually preceded by a consultation between the master and the merchants, who frequently accompanied their wares upon the voyage, with respect to the necessity for an extraordinary sacrifice for the common safety, and the best means of attaining that end. Although such a conference has long since been discontinued in practice, there is a sense in which it is still held in theory, inasmuch as the master becomes agent for the owner of the cargo as well as for the ship-owner in times of emergency, with authority to bind both parties in the adoption of such measures as are expedient in the common interest.¹

The general average act, then, must be judicious. Its starting point is danger, and its objective point is safety.

If the master is disabled, whoever is in active command of the ship may, in case of necessity, make the jettison or other sacrifice.²

It is one of the commonly accepted rules in the law of general average, that the party whose negligence has made the sacrifice necessary cannot claim contribution in general average.³

§ 120. Sacrifices Enumerated.—The sacrifices recoverable under the principles above stated include the following: The cutting away of masts, spars, or sails to right a vessel which is on her beam ends or to rescue her from other imminent peril;⁴ the shipping of her anchors and chains to avoid stranding or collision; the breaking of bulwarks to relieve the vessel of water which floods her decks; the jettison of cargo materials or stores for the common safety; the extraordinary use of materials and stores in moving a stranded ship off the ground, such as the setting of the sails for that purpose in case of a sailing vessel, the breaking of the engines in the case of a steamer, or the use of anchors, chains, bolts, hawsers, etc., in either case; the scuttling of a vessel for the purpose of admitting water to extinguish a fire;⁵ the use at sea of spare spars, sails, ropes, or other materials and stores for the purpose of

¹ *Gratitudine*, 3 Chas. Robinson, 240.

² *Ralli v. Troop*, 37 Fed. Rep., p. 888. *Lawrence v. Minturn*, 17 How. 110. *Price v. Noble*, 4 Taunt. 123.

³ *Robinson v. Price*, L. R., 2 Q. B. D. 91. *The Parana*, L. R., 1 Prob. Div. 452. *Portsmouth*, 9 Wall. 682

⁴ *Margareta Blanca*, 14 F. R. 59.

⁵ *Ralli v. Troop*, 37 F. R. 886.

stopping a leak, rigging jury masts, fishing sprung masts, or for any other purpose where the common safety appears to necessitate the sacrifice; the sale of ship or cargo or part thereof,¹ and in the United States the jettison of deck load when its stowage on deck is warranted by custom;² and also damage from voluntary stranding of the ship, and repairs thereby necessitated.³

The principal sacrifices of cargo other than jettison and its consequences which come into general average are as follows: Any loss or damage which cargo may suffer through being discharged on to the shore, dragged through the surf, landed in rafts, placed in lighters, put on muddy ground, or otherwise treated in an unusual way to float a stranded ship;⁴ but when goods once reach a place of safety, they cease thereafter, according to the English rule, to be at the risk of the general interest.⁵

Any loss or damage to cargo necessarily arising from a forced discharge when the cost of the discharge is allowed in general average is itself allowable.⁶

Any loss or damage to the cargo, whether suffered by water on board, or otherwise admitted into the ship's hold to extinguish a fire.

Any loss or damage to cargo caused by water entering the ship's hold through holes made by the fall of a mast cut away for the common safety, provided such loss or damage was the proximate result of the cutting away.⁷

The loss of cargo consumed as fuel to work a steamer's engines or a donkey engine in time of peril, provided the supply of fuel was originally sufficient. Passengers' baggage, though itself not liable to contribute.⁸

§ 121. Deck Load.—In the United States and England, in the absence of an express prohibition in the policy, the

¹ *Nelson v. Belmont*, 5 Duer, 310.

⁶ *Gregory v. Orrall*, 8 Fed. Rep.

² *Taunton Co. v. Ins. Co.*, 22 Pick. 287.

108.

⁷ *Maggrath v. Church*, 1 Caines R.

³ *N. W. Transfer Co. v. Cont. Co.*, 24 Fed. Rep. 171.

196. *Saltus v. Ocean Ins. Co.*, 14 Johns. 138.

⁴ *Lewis v. Williams*, 1 Hall, 430.

⁸ *Heye v. North German Lloyd*, 33

⁵ *Svendson v. Wallace*, 10 App. Cas. Fed. Rep. 60. 404.

courts allow a jettison of deck load to be included in general average, provided a custom of the trade can be shown justifying the loading of the goods on deck.¹ But, if no such custom is proved, a claim for jettison of deck load cannot be allowed in general average,² although if a deck load is saved by a general average act, it must itself contribute. There must be an actual intention to throw the deck cargo overboard in order to constitute a general average act.³

§ 122. Voluntary Stranding.—In the United States the voluntary stranding of a ship when in peril is held to be a general average act, and that irrespective of the question whether the vessel ultimately becomes a total wreck or not.⁴ But general average is not allowed in favor of the ship-owner if the voluntary stranding was made necessary by negligent navigation of the ship.⁵ A voluntary stranding is not allowed as a general average act by the English court in the absence of express agreement, and the view of that court is defended mainly upon two grounds: (1) that the stranding is not a sacrifice at all, nor the result of any selective discrimination between different interests, but on the contrary is an attempt to put both ship and cargo into a situation of less peril; and (2) that in practice it is impossible to distinguish between damages received by the ship and cargo prior to stranding, which are admittedly particular and not general average, and losses sustained after or in consequence of stranding, which it is claimed should come into general average.

The York Antwerp rules, it will be noticed, on this as on some other points, have struck a compromise between conflicting views.

§ 123. Port of Refuge, and other Expenses.—The most frequent cause of general average expenses occurs where a vessel in peril puts into a port of refuge for repairs to enable

¹ *Harris v. Moody*, 30 N. Y. 266; ⁴ *Barnard v. Adams*, 10 How. 270. s. c., 86 Am. Dec. 375. *Wood v. Columbian Ins. Co. v. Ashby*, 13 Phoenix Ins. Co., 8 Fed. R. 27. Peters, 331. *Fowler v. Rathbones*, 12

² *The Milwaukee Belle*, 2 Biss. 197. Wall. 102. *Star of Hope*, 9 Wall. 203.

³ *The Adele Thacker*, 24 Fed. R. Emery v. Huntington, 109 Mass. 431.

809. ⁵ *Snow v. Perkins*, 39 Fed. R. 334.

her to continue the voyage. The general average practice in such a case in the United States differs in some particulars from the rules prevailing in England.¹

By the law of this country, wages and provisions of the crew are allowed, in general average, from the time of deviating from the voyage for the purpose of putting into a port of refuge, until the voyage is resumed, or until the cargo and vessel are separated, or until there is no longer a reasonable prospect that the voyage will be continued.²

The expenses of entering the port, and of unloading, warehousing, and reloading the cargo, are allowable, provided the voyage is resumed, or so long as there is a fair prospect of its continuance.³

Before dealing with the cargo, however, in a port of refuge, the master is bound to communicate with its owners if it is possible, in order to take their instructions.⁴

Goods or money paid for ransom or salvage, or for other services rendered for the common benefit, are also allowed in general average. But if the expense is not incurred for the common safety, then it is chargeable, in particular average, to that interest which it was intended to benefit.⁵

§ 124. The Adjustment.—The proportions in which a general average loss is to be borne must be ascertained by an adjustment, in which the owner of each separate interest is to be charged with such proportion of the value of the things lost as the value of his part of the property affected bears to the value of the whole.⁶

An adjustment made at the end of the voyage, if valid there, is valid anywhere. The first port reached subsequent to the general average act, where any or all the interests are separated, may be the end of the voyage for this purpose.⁷

¹ Svendsen v. Wallace, 10 App. Cas. 404.

² Hobson v. Lord, 92 U. S. 397. The Star of Hope, 9 Wall. 203.

³ The Joseph Farwell, 31 Fed. Rep. 844.

⁴ The Julia Blake, 107 U. S. 413.

⁵ Douglas v. Moody, 9 Mass. 548.

McAndrews v. Thatcher, 3 Wall. 347. McGaw v. Ocean Ins. Co., 23 Pick. 405. Ocean St. C. Co. v. Anderson, 13 Q. B. D. 651.

⁶ Wheaton v. China Mut. Ins. Co., 39 Fed. Rep. 879.

⁷ Barnard v. Adams, 10 How. 270. Bradley v. Cargo of Lumber, 29 Fed. Rep. 648.

Inasmuch as a lien exists upon the cargo in favor of the ship to secure general average contribution, it is customary for the consignees of the cargo, in order to secure an immediate delivery of their cargo, to give an undertaking or to make a deposit to cover any amount for which they may be ultimately liable in general average.

The rules of practice for the adjustment of general average losses vary greatly in detail in different countries and in different ports. The regulations most frequently used by agreement are the York Antwerp rules, adopted by the Association for the Reform and Codification of the Law of Nations, at Antwerp, in 1877, and amended at their Liverpool conference in 1890. These as amended are as follows :

§ 125. York Antwerp Rules.

Rule I. JETTISON OF DECK CARGO.—No jettison of deck cargo shall be made good as general average.

Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

Rule II. DAMAGE BY JETTISON AND SACRIFICE FOR THE COMMON SAFETY.—Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

Rule III. EXTINGUISHING FIRE ON SHIPBOARD.—Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average ; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

Rule IV. CUTTING AWAY WRECK.—Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

Rule V. VOLUNTARY STRANDING.—When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or

drive on shore or on rocks, no loss or damage caused to the ship, cargo, and freight, or any of them, by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

Rule VI. CARRYING PRESS OF SAIL; DAMAGE TO OR LOSS OF SAILS.—Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

Rule VII. DAMAGE TO ENGINES IN REFLOATING A SHIP.—Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavoring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

Rule VIII. EXPENSES LIGHTENING A SHIP WHEN ASHORE, AND CONSEQUENT DAMAGE.—When a ship is ashore and, in order to float her, cargo, bunker coals, and ship's stores, or any of them, are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

Rule IX. CARGO, SHIP'S MATERIALS, AND STORES BURNT FOR FUEL.—Cargo, ship's materials, and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the ship-owner and credited to the general average.

Rule X. EXPENSES AT PORT OF REFUGE, ETC.—(a) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the ex-

penses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average.

(b) The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average, when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(c) Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average.

(d) If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transshipment, and forwarding, or any of them (up to the amount of the extra expense saved), shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

Rule XI. WAGES AND MAINTENANCE OF CREW IN PORT OF REFUGE, ETC.—When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs, mentioned in Rule VII., the wages payable to the master, officers, and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers, and crew, incurred after the date of

the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

Rule XII. DAMAGE TO CARGO IN DISCHARGING, ETC.— Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading, and stowing, shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

*Rule XIII. DEDUCTIONS FROM COST OF REPAIRS.—*In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz. :

In the case of *iron or steel ships*, from date of original register to the date of accident,—

Up to 1 year old (A).	{ All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
Between 1 and 8 years (B).	{ One-third to be deducted off repairs to and renewal of wood-work of hull, masts and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets, and hawsers (other than wire and chain), awnings, covers, and painting. One-sixth to be deducted off wire rigging, wire ropes and wire hawsers, chain cables and chains, donkey engines, steam winches and connections, steam cranes and connections; other repairs in full.
Between 3 and 6 years (C).	{ Deductions as above under Clause B, except that one-sixth be deducted off iron-work of masts and spars, and machinery (inclusive of boilers and their mountings).
Between 6 and 10 years (D).	{ Deductions as above under Clause C, except that one-third be deducted off iron-work of masts and spars, repairs to and renewal of all machinery (inclusive of boilers and their mountings), and all hawsers, ropes, sheets, and rigging.
Between 10 & 15 years (E).	{ One-third to be deducted off all repairs and renewals, except iron-work of hull and cementing and chain cables, from which one-sixth to be deducted. Anchors to be allowed in full.

Over 15 years (F).	{ One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off chain cables.
Generally (G).	{ The deductions (except as to provisions and stores, machinery, and boilers) to be regulated by the age of the ship, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use.

In the case of *wooden or composite ships* :

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made. After that period a deduction of one-third shall be made, with the following exceptions :

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labor metaling are subject to a deduction of one-third.

In the case of *ships generally* :

In the case of all ships, the expense of straightening bent iron-work, including labor of taking out and replacing it, shall be allowed in full.

Graving dock dues, including expenses of removals, cartages, use of shears, stages, and graving dock materials, shall be allowed in full.

Rule XIV. TEMPORARY REPAIRS.—No deductions “new for old” shall be made from the cost of temporary repairs of damage allowable as general average.

Rule XV. LOSS OF FREIGHT.—Loss of freight arising from damage to or loss of cargo shall be made good as general

average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Rule XVI. AMOUNT TO BE MADE GOOD FOR CARGO LOST OR DAMAGED BY SACRIFICE.—The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

Rule XVII. CONTRIBUTORY VALUES.—The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the ship-owner's freight and passage-money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Passengers' luggage and personal effects, not shipped under bill of lading, shall not contribute to general average.

Rule XVIII. ADJUSTMENT.—Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules.

§ 126. Contributory Value of Freight.—As has been observed, the law prevailing in the United States does not conform in all respects to these rules.

In respect to the contributory value of the freight interest, which cannot always be easily ascertained, an arbitrary rule has been adopted in New York. While the full amount of freight is contributed for in general average, only fifty per cent. of that amount is called upon for contribution.¹ That is supposed to be a rough estimate of its net value at the end of the voyage, after expenses have been deducted from the gross freight.

¹ Rathbone v. Fowler, 6 Blatch. 296.

CHAPTER XI.

THE NEW YORK STANDARD FIRE POLICY.

THE dissimilarities existing in numerous forms of fire policies resulted in inconveniences and uncertainties, especially in cases where the same property was insured by policies in different companies, which often thus furnished inconsistent provisions for the adjustment of the same loss. This and other considerations influenced the legislatures of certain States to pass statutes for the adoption of standard forms of fire policies. A list of references to these statutes will be found in the appendix. The actual framing and adoption of the standard policy by the several States was sometimes separated by a considerable interval of time from the enactment making provision for its adoption.

In framing a standard form of fire policy Massachusetts was the pioneer State. Under the act of 1886, Chapter 488, passed prior to the Massachusetts act, New York followed with the preparation of a standard form differing in many particulars from that previously drafted by the Massachusetts authorities. The other States mentioned in the list already referred to have accepted either substantially or precisely the New York standard form. This was drafted under the provisions of the New York statute ostensibly by a committee of the New York Board of Fire Underwriters, but actually by that committee in conference with a committee of the National Board of Fire Underwriters, and all that legal knowledge and business experience could furnish was brought to bear upon the careful construction of this important instrument.¹ The aim, among other things, was to avoid giving occasion for novel questions of controversy by making it accord in its phraseology with the decisions of the court of last resort in this State.

¹ The work was superintended by William Allen Butler, Esq., of the New York bar.

The use of the standard form is made by the statute obligatory in New York upon all fire companies doing business within the State, and a penalty is imposed for violating the act, but it is provided that any policy in form inconsistent with the provisions of the act shall nevertheless be binding upon the company issuing the same.

It is hardly necessary to remark that the policy is not an absolute agreement to grant indemnity to the insured at all events for the loss occasioned by the casualty insured against, but is made dependent upon the fulfilment on his part of certain provisions of the contract which are called conditions. If any one of these is violated or unperformed, the policy is avoided, and there can be no recovery unless the policy is subsequently confirmed by the insurer. The conditions for the most part are expressed in the contract itself, and to solve their proper meaning, force, and effect must be the chief concern in the study of fire-insurance law. An inspection of the New York standard policy, given in the appendix, will show that some of its conditions are precedent to the effectual making of the contract; others pre-suppose the contract made, but are precedent to a right of action thereon. Others declare events in which all right under the contract is forfeited, or otherwise define the obligations of the parties, or restrict the liability of the insurers: Others deal with the mode of settling disputes, and others limit the period for bringing suit. The conditions may also be divided into three classes; those precedent to a valid inception of the contract, those relating to the contract during the pendency of the risk, and those which appertain to the presentation of the claim of the assured and the proofs of his loss. Before the standard policy was adopted, much complaint was made regarding the fine-print conditions ordinarily inserted in a fire policy. The chief justice of the New Hampshire court made the character of these conditions the subject of a forcible but unjudicial tirade against insurance companies generally.¹ We shall examine the clauses of the New York standard policy in the order in which they occur in the policy.

§ 127. In Consideration of the Stipulations and Premium.—The insurer is entitled to payment of premium

¹ De Laney v. Ins. Co., 52 N. H. 581.

upon the inception of the risk or closing of the contract unless otherwise agreed, but ordinarily the payment of the premium is not made a condition of the policy, nor is its non-payment made a ground of forfeiture. It is generally paid in cash or check, but may be paid by notes or credit. Premium notes in mutual companies are generally made a lien upon the property insured.¹ If the risk attaches, the premium is not returnable except as provided by the terms of the agreement or by statute. If the contract is rescinded, the premium is returnable;² but if void for fraud it is not returnable.³

§ 128. Insures against all Direct Loss by Fire.—

Loss by fire means the result of the ignition of the property insured or some substance near to it. For example, where sugar was spoiled by great heat from a fire in ordinary use because of the closing of a register, the company was held not liable, and so also where the heat of the sun contracted timber without any actual fire;⁴ and similarly where the interior of a boiler was damaged by overheating from regular furnace fires owing to absence of water in the boiler;⁵ but the proximate results of fire within the rule of law establishing the liability of the insurer may include other things than combustion; as, for example, injuries to the insured property by water from the fire-engines, or exposure of goods during the fire, or during their reasonable removal, and the loss of goods by theft during the fire, or during a reasonable removal to a place of safety.⁶

If a policy were silent upon the subject, loss by fire would include loss by a gunpowder explosion, but not loss by a steam explosion or by the wind.⁷ It would not include loss by

¹ Woodfin v. Asheville Mut. Ins. Co., 6 Jones (N. C.) 558. Atkinson v. Newcastle & G. W. W. Co., L. R. 6 Ex. 404.

² Ins. Co. v. Pyle, 44 Ohio St. 13; s. c., 58 Am. Rep. 781. ³ American Towing Co. v. Ger. Fire Ins. Co., 20 Ins. L. J. 402 (Md. 1891).

⁴ Blaeser v. Milwaukee Mut. Ins. Co., 37 Wis. 31; s. c., 19 Am. Rep. 747. ⁵ Stanley v. Western Ins. Co., L. R., 3 Exch. 74; s. c., 37 L. J. Q. B. 73. Babcock v. Montgomery Co. Mut. Ins. Co., 6 Barb. 637. White v. Republic Fire Ins. Co., 57 Maine 91; s. c., 2 Am. Rep. 23.

⁶ Babcock v. Montgomery Co. Mut. Ins. Co., 6 Barb. 637. Austin v. Drewe, 6 Taunt. 436. Scripture v. Lowell Mut. Fire Ins. Co., 64 Mass. (10 Cush.) 356; s. c., 67 Am. Dec. 111. ⁷ Waters v. Merchants' Louisville Ins. Co., 11 Peters 218. Scripture v.

lightning unless ignition resulted, but a lightning clause may be attached to the policy.¹

Fire originating in spontaneous combustion is within the risk. Damage caused by concussion caused by an explosion of gunpowder in another building is not within the risk.² But the special provisions of the contract govern.

The policy includes loss by the incendiary act of the insured if insane, and includes the unintentional or careless acts of third persons, whether his agents or not, as well as their criminal acts; but if the fire is caused by the willful act of the insured himself, or of some one acting with his privity or consent, the insurer will be exonerated. Arson by the wife of the insured without his connivance would be no defence to the company.³

Arson by an officer of an insured corporation, unless something like a conspiracy could be shown among those interested in the corporation, would be no defence to the insurer, because a corporation does not impliedly authorize its representatives to commit a crime.⁴

The word "direct" is not in the corresponding clause of the Massachusetts policy.

§ 129. The Following Described Property.—The description of the property is written into the printed form, usually in brief but comprehensive terms. Hence, if the language of the description leaves it doubtful what goods or buildings or other property it was intended to cover, the courts construe the ambiguity liberally in favor of the insured, with a view to give a full indemnity for all that might reasonably be considered included in the description. Accordingly, the description of the policy covers not only what is specifically

Lowell Mut. Fire Ins. Co., 10 Cush. 356; s. c., 67 Am. Dec. 111. *Brown v. St. Nicholas Ins. Co.*, 61 N. Y. 332. *Millandon v. New Orleans Ins. Co.*, 4 La. Ann. 15; s. c., 50 Am. Dec. 550. *Transatlantic Fire Ins. Co. v. Dorsey*, 56 Md. 70; s. c., 40 Am. Rep. 403.

¹ *Everett v. The London Assurance*, 19 C. B. N. S. 126. *Babcock v. Mont-*

gomery Co. Mut. Ins. Co., 4 N. Y. 326.

² *Everett v. The London Assurance*, 19 C. B. N. S. 126. *Caballero v. Home Mut. Ins. Co.*, 15 La. Ann. 217.

³ *Midland Ins. Co. v. Smith*, 6 Q. B. D. 568. *Karow v. Cont. Ins. Co.*, 57 Wis. 56; s. c., 46 Am. Rep. 17.

⁴ *Commonwealth v. Wachendorf*, 141 Mass. 270.

enumerated but also whatever is necessarily appurtenant to it or included in it.¹

As we have had occasion to notice, evidence of usage is admissible to show the meaning of ambiguous words as employed in any trade. Thus, in an action upon a fire policy described to cover a junk dealer's stock of "rags" and "old metals," evidence was admitted to show that by trade custom those terms had acquired a broader signification than belongs to them in common usage.²

A policy upon merchandise in a store applies to the stock successively in the store from time and time.³

§ 130. Location.— *While located and contained as described herein and not elsewhere.*

Place is ordinarily material to the contract and of the very essence of the risk, and a change of locality without consent of the insurers removes the goods from the protection of the policy, though it contain no special provision to that effect.

With varying location the risk is apt to vary, and whether it does or not is immaterial, for the insurers have the right to know what risk they are assuming, and often decline an insurance because of the amount of risk already placed by themselves or others upon the same building or property.⁴

If consent to removal is obtained, goods are not protected in transit unless the policy so provides, but are protected in the old place until removed.⁵

But it has been held that where the clause in the policy is

¹ *Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 26. *Lovewell v. Westchester Fire Ins. Co.*, 124 Mass. 418; s. c., 26 Am. Rep. 671. *Phoenix Ins. Co. v. Favorite*, 49 Ill. 259. *Medina v. Builders' Mut. Fire Ins. Co.* 120 Mass. 225. *Clarke v. Firemen's Ins. Co.*, 18 La. 431. *Hannan v. Williamsburgh City Fire Ins. Co.*, 81 Mich. 560.

² *Mooney v. Howard Ins. Co.*, 138 Mass. 375; s. c., 52 Am. Rep. 377.

³ *Hooper v. Hudson River Fire Ins. Co.*, 17 N. Y. 424. *Am. Cent. Ins. Co. v. Rothchild*, 82 Ill. 166. *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405.

⁴ *Lyons v. Providence Washington Ins. Co.*, 14 R. I. 109; s. c., 51 Am. Rep. 364. *London and Lancashire Ins. Co. v. Lycoming Fire Ins. Co.*, 105 Pa. State 424, 432. *Theobald v. Railway Passengers' Assur. Co.*, 10 Exch. 45. *Bradbury v. Fire Ins. Asso.*, 80 Me. 396. *Sampson v. Security Ins. Co.*, 133 Mass. 49. *Wall v. East River Mut. Ins. Co.*, 7 N. Y. 370. *English v. Franklin Fire Ins. Co.*, 55 Mich. 273; s. c., 54 Am. Rep. 377.

⁵ *Kunz v. Amer. Exch. Fire Ins. Co.*, 41 N. Y. 413. *Sharpless v. Ins. Co.*, 140 Pa. St. 437 (1891).

simply in the words, "the following described property contained in" a certain building; the location is not material, if the nature of the property makes it clear that it must have been the intention of the parties to protect it by the policy whether in the particular place or not. In that event a designation of place is looked upon as merely descriptive and to be controlled by the necessary use of the thing insured. For example, where a horse, described as in a barn, was insured against fire or lightning, the court was of opinion that it was not the intention of the parties to retain the protection of the policy only in the event that the horse was kept in the barn all the time waiting for a fire or a stroke of lightning.¹

Where an oil-tank was carried away by a flood to another part of the tract named in the policy and took fire there, the company was held.² But in the case of furniture or stock described as contained in a certain building, the designated location is without doubt an essential element of the contract.³

The form of the standard policy eliminates all ground for contention.

This clause is not a part of the Massachusetts standard policy.

§ 131. Held in Trust.—*Their own, or held by them in trust or on commission, or sold but not delivered.*

Such special phrases are often employed to show that persons holding the property of others may secure the protection of the policy though the title to the property may or may not be in them.

Held in trust means simply that the goods or property are in the custody of the insured. The phrase is not used in its strict technical meaning.⁴

§ 132. For Whom it may Concern.—These words, which are seldom used in a fire policy, protect all those who

¹ Haws v. Fire Asso., 114 Pa. State 431. Trade Ins. Co. v. Barraciff, 45 N. J. L. 543. Longueville v. West. Ass. Co., 51 Iowa, 553; s. c., 33 Am. Rep. 146. Towne v. Fire Asso., 27 Ill. App. 433.

³ Lyons v. Prov. Wash. Ins. Co., 14 R. I. 109; s. c., 51 Am. Rep. 364.

⁴ Lucas v. Ins. Co., 23 W. Va. 258; s. c., 48 Am. Rep. 383. Snow v. Carr, 61 Ala. 363. Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527. Hough v. People's Fire Ins. Co., 36 Md. 398.

² Western, &c., Pipe Lines v. Home Ins. Co., 21 Ins. L. J. 24 (Penn. 1892).

have any insurable interest in the property, but are held, like other general descriptions of the insured, to include only those who are within the contemplation of the parties at the time the contract was made. Who these were may be shown by parol.¹

The owners who were intended to be covered may ratify the insurance and take the benefit of it, though ignorant of its existence at the time of the issuance of the policy.² It has been held that they may ratify even after loss.³ If the insured collects the whole amount of the policy, he will hold as trustee the portion of the proceeds belonging to the others.⁴

§ 133. Measure of Damages.—*Not liable beyond actual cash value of the property at the time of loss, with proper deduction for depreciation however caused.*

This in express terms excludes remote damages, such as loss from interruption of business, prospective rent or profit, except as these are specifically insured; it also excludes any *pretio affectionis*. The market or cash value at the time of the fire rules, and the cost price is relevant, if at all, only as bearing upon that.⁵

Experts familiar with property similar to that described or injured may testify as to values.⁶

And the difference between the actual cash value of the property just before the fire and its value after the fire is the measure of indemnity where the property has been injured and not destroyed.

If, during the pendency of the risk, there has been more than one loss under the policy, the recovery in the aggregate is limited to the face of the policy.

¹ Pacific Ins. Co. v. Cattell, 4 Wend. Selw. 485. Protestant Ins. Co. v. Newson v. Douglass, 7 Har. & J. Wilson, 8 Ohio St. 553.
417.

² Waring v. Indemnity Ins. Co., 45 Creaton, 98 Pa. St. 451; s. c., 42 Am. N. Y. 606. Rep. 618. Birmingham Fire Ins. Co.

³ Herkimer v. Rice, 27 N. Y. 163. v. Pulver, 126 Ill. 329. Snell v. Delaware Ins. Co., 4 Dallas, 430. Brown v. Quincy Ins. Co., 105 Mass. 396.

⁴ Clark v. Baird, 9 N. Y. 183. Teerpenning v. Com. Exch. Ins. Co., 48 N. Y. 279. Reed v. Washington F. & M. Ins. Co., 138 Mass. 572.

⁵ Hagedorn v. Oliverson, 2 Maule & Ins. Co., 138 Mass. 572.

In case the insurer exercises its option to rebuild or repair, the rule of damages here defined is superseded by the contract of building, which amounts to a new and independent agreement.¹ But, if the insured refuses to permit the insurer to rebuild, the latter having seasonably elected to do so, the former can maintain no action upon the policy.²

If the policy is valued, and the loss is total, as has been noticed heretofore, the face of the policy fixes the amount.³

The extent of the insurer's liability is often modified by particular clauses; as, for example, one of the various forms of co-insurance clauses or average clauses of which specimens are given in the appendix.

The object of the co-insurance clause is to compel the insured to take out insurance to the full value of his property, or else to become a co-insurer to the amount of the deficiency; and the average clause applies where property is insured as an entirety, though located in several places or buildings in proportions unknown to the insurers, and its object is to compel the insured to consider the property as ratably distributed where there is a loss in one place or building, and not in all.

The amount of recovery to which different classes of persons are entitled, as dependent upon the extent of their insurable interest, the form of the policy, and whether they insure for themselves alone or for the benefit of others also interested in the property, has been sufficiently explained under the discussion of general principles.

The word "cash" is omitted from the Massachusetts form.

§ 134. Reinstatement Clause.—*Optional with company to take all or any part of the articles at ascertained or appraised value, or to rebuild or replace property lost or damaged within reasonable time, on giving notice within thirty days after receipt of proofs, but there can be no abandonment to the company of the property.*

This option is reserved by the company to protect itself

¹ Wynkoop v. Niagara Fire Ins. Co., 91 N. Y. 478. Morell v. Irving Fire Ins. Co., 33 N. Y. 429.

² Beals v. Home Ins. Co., 36 N. Y. 522.

³ Phoenix Ins. Co. v. McLoon, 100 Mass. 475.

against extravagant claims, and to prevent disputes as to the amount of damage.

If the company once elect to do so, they must reinstate, and cannot afterwards repudiate their election. And the converse is also true, for the selection of one alternative constitutes an abandonment of the other.¹

The election to restore or rebuild involves not only the rejection of the right to pay the cash value to the insured, but also the waiving of all those provisions of the contract having reference to that method of performance. From the time of such election the contract between the parties becomes an undertaking on the part of the insurers to build or repair the subject insured, and to restore it to its former condition, and the measure of damages for a breach of this substituted contract of building does not necessarily depend on the amount of damage inflicted by the peril insured against.²

If the insurers, in the attempt to restore the property, do more than their contract obligates them to do, they cannot claim allowance for the excess of value.³

If, without fault of the insured, the company either neglects to complete the work or is prevented from doing so by the interference of the public authorities, the loss will fall upon the insurers.⁴ So, also, if during the rebuilding or repairing the property is again burned; for here, too, through no fault of the insured, the insurers have failed to fulfill their contract.

Whether the work of repairing or rebuilding is done properly and within a reasonable time, must generally be a question for the jury,⁵ and for any breach of their obligations the insurers will be held responsible, according to the ordinary rules of damage.

The rebuilding clause has been held to have no application to a mortgagee's policy.

The Massachusetts standard policy has a similar provision allowing the company to restore upon giving notice within

¹ *Times Fire Assur. Co. v. Hawke*, 1 Fost. & F. 406.

² *Wynkoop v. Niagara Fire Ins. Co.*, 91 N. Y. 478; s. c., 43 Am. Rep. 686. *Morell v. Irving Fire Ins. Co.*, 33 N. Y. 429.

³ *Brinley v. National Ins. Co.*, 11 Met. 195.

⁴ *Brown v. Royal Ins. Co.*, 1 El. & El. 853.

⁵ *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray, 432.

fifteen days after the proofs of loss are submitted, and the company is declared not liable for more than the sum insured with interest.

§ 135. This Entire Policy shall be Void.—Before this phrase was inserted in the policy, the better opinion was that the contract of insurance was severable in those cases where it covered several items of property which were insured in separate amounts either at separate rates or for a single premium which could be mathematically apportioned or approximately so, and provided the breach of warranty affected only a portion of the items.¹ But the phraseology of the standard policy admits of no ambiguity.²

The word “entire” is omitted from the similar clause of the Massachusetts form.

§ 136. Interest of the Insured not Truly Stated in the Policy.—Except for this requirement the insured might describe his interest in the most general terms, and if he had any insurable interest at all it would avail to sustain the contract.³

He might describe the property as his or say that he was the owner, and if that were true in any substantial sense he could recover to the extent of his insurable interest;⁴ as, for example, where the insured called the property his but in reality had only a life estate.⁵

But under this clause he is bound to disclose the character of his insurable interest; whether, for example, he is owner, trustee, consignee, factor, agent, mortgagee or lessee, and make sure that the description of his interest is truly noted in the policy. It is only right that the insurers should know the nature and extent of his insurable interest.

¹ Loomis v. Rockford Ins. Co., 77 Wis. 87. Schuster v. Dutchess Co. Ins. Co., 102 N. Y. 260.

² Smith v. Agricultural Ins. Co., 118 N. Y. 518. Geiss v. Franklin Ins. Co. 123 Ind. 172.

³ Buffum v. Bowditch Mut. Fire Ins. Co., 10 Cush. 540.

⁴ Dacey v. Agricultural Ins. Co., 21 Hun, 83. Trade Ins. Co. v. Parracliff, 45 N. J. Law 543; s. c., 46 Am. Rep. 792. Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335 (1891).

⁵ Allen v. Charlestown Mut. Fire Ins. Co., 5 Gray, 384.

This clause, however, does not require him, unless particularly interrogated on the subject, to state the circumstances which relate to the value or permanency of his interest. For example, if the character of his title is a fee simple and the property is consequently described as his, he need not state that he is only a part owner;¹ or that there are mortgages or other incumbrances outstanding upon his property;² or that he has made an agreement to part with the title in the future;³ or that his property has been seized on execution but not yet sold.⁴ Any obligation which may rest upon him to make such disclosures does not come by virtue of this particular clause.

The word "interest" has been appropriately used in the standard form in place of the words "title or possession," for the reason that there are some insurable rights, like that of mortgagee or surety or stockholder, to which the attributes of title and possession are not necessarily incident. But it is apprehended that the substitution of this broad word does not impose an obligation upon the insured to make any fuller or other disclosure in respect to his title or possession than is required by the other form of words, although the ruling in the following cases might lead to a different conclusion.⁵

If the policy is made payable to one "as his interest may appear," the interest need not be stated. The written words overrule the requirement of the printed form.⁶

This clause does not appear in the Massachusetts form.

§ 137. In Case of Any Fraud or False Swearing.

—This provision is perhaps only the express declaration of a doctrine understood to be applicable to insurance contracts. But it makes clear the extension of the rule in full force to intentional misstatements made after the loss, as well as those

¹ *Peck v. New Lond. Co. Mut. Ins. Co.*, 22 Conn. 575. *Turner v. Burrows*, 5 Wend. 541.

² *Dolliver v. St. Joseph F. & M. Ins. Co.*, 128 Mass. 315; s. c., 35 Am. Rep. 378. *Judge v. Conn. Fire Ins. Co.*, 132 Mass. 521. *Carson v. Jersey City Fire Ins. Co.*, 43 N. J. L. 300; s. c., 39 Am. Rep. 584.

³ *Davis v. Quincy Mut. Fire Ins. Co.*, 10 Allen, 113.

⁴ *Strong v. Manuf'rs Ins. Co.*, 10 Pick. 40; s. c., Am. Dec. 507.

⁵ *Edmunds v. Mut. Safety Fire Ins. Co.*, 1 Allen, 311. *Abbott v. Hampden Mut. Fire Ins. Co.*, 30 Me. 414. *Lee v. Agricultural Ins. Co.*, 79 Iowa, 379.

⁶ *Dakin v. Liverpool, L. & G. Ins. Co.*, 77 N. Y., 600.

made to induce the insurers to accept the risk. In fact, it is by the statements contained in the proofs of loss that the insured, if unscrupulous, is most tempted to deviate from strict honesty in order to swell the amount of his recovery.

False swearing in the proofs of loss, to vitiate the policy, must be intentionally false, whether by a fraudulent overvaluation of the goods destroyed, or a statement of items which really have no existence, or by an undervaluation of what is saved, or in any other particulars.¹ An innocent mistake,² or an innocent though exaggerated estimate of value, will not avoid the policy.³ The overvaluation, in order to work a forfeiture, must be so plain that it cannot be accounted for upon the principle that every man is naturally prone to put a favorable estimate upon the value of his own property.⁴

The question of fraud or false swearing is generally for the jury, and the company does not receive much consideration at their hands unless a clear case of dishonesty is established. But if it appears by the plaintiff's own showing⁵ that his statement of value was knowingly and intentionally exaggerated, a forfeiture ought to be found by the court.⁶

Where the discrepancy between the representation of the insured and the finding of the fact by the jury is very great, a limit will be reached where the court will intervene and decide as matter of law that the amount of the error is consistent only with bad faith.

To illustrate, where a house was valued at \$1,400, and the evidence showed its value to be about \$1,000, it was held that this difference did not establish as matter of law that there had been a breach of warranty against overvaluation.⁷

¹ *Chapman v. Pole*, 22 L. T. N. S. Am. Rep. 625. *Susquehanna Mut. 307. Clafin v. Commonwealth Ins. Fire Ins. Co. v. Staats*, 102 Penn. St. Co., 110 U. S. 81. *Sternfeld v. Park* 529. *Towne v. Springfield Fire, &c., Fire Ins. Co.*, 50 Hun, 262. *Mullin v. Ins. Co.*, 145 Mass. 582.

Vt. Mut. Fire Ins. Co., 58 Vt. 113. ⁴ *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77. *Franklin Fire Ins. Co. v. Vaughan*, 92 U. S. 516.

Watertown Fire Ins. Co. v. Grehan, 74 Ala. 642. *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410. ⁵ *Carson v. Jersey City Fire Ins. Co.*, 14 Vroom. 300; s. c., 29 Am. Rep. 584.

² *Thierolf v. Universal Fire Ins. Co.*, 110 Penn. St. 37. ⁶ *American Ins. Co. v. Gilbert*, 27 Mich. 429.

³ *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283. *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291; s. c., 40 30. ⁷ *Smith v. Home Ins. Co.*, 47 Hun,

Putting the value of \$2,000 upon goods worth \$1,200 was held not to prove a fraudulent intent.¹ Also, where a value of \$5,000 was given to property worth \$2,000, a finding of no fraudulent intent was not set aside. But there was also a finding that the actual value of the property destroyed exceeded the amount of insurance.² But in another case a rule *nisi* for a new trial was made absolute where the claim sworn to was £1,085, and the amount found by the jury was only £500, the court concluding that this finding of fact ought to be considered in effect a verdict for the defendant.³

And where the proofs made the loss three times as large as the amount found by the jury, and no reason being disclosed for supposing that the misstatement arose inadvertently, the court was of opinion that fraud was shown as matter of law and that the policy should be held forfeited, notwithstanding the jury's verdict for the plaintiff.⁴

It will be observed that in the matter of innocent misrepresentations of fact a clear distinction is made between those antecedent statements which, if material, form the inducement for the contract, and, whether material or not, are generally incorporated in the contract as warranties, and those statements, on the other hand, which are made after the loss, in an attempt to give to the insurers such information as may be available respecting the origin, character, and extent of the loss already accrued. But statements intentionally false in the proofs of loss amount to perjury.⁵

The corresponding clause in the Massachusetts standard policy is as follows: "This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured." This does not refer to statements in the proofs of loss, but only to the inducing representations upon which the contract is based, and the wording of the clause makes the question of fairness one for the jury.⁶ The Massachusetts statute is also pertinent upon this point.

¹ Behrens v. Germania Fire Ins. Co., 64 Iowa. 19.

² Dogge v. Northwestern Nat. Ins. Co., 49 Wis. 501.

³ Levy v. Baillie, 7 Bing. 349.

⁴ Sternfeld v. Park Fire Ins. Co., 50 Hun, 262.

⁵ Avery v. Ward, 150 Mass. 160 (1889).

⁶ Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335 (1891).

CHAPTER XII.

STANDARD FIRE POLICY—CONTINUED.

§ 138. Other Insurance.—*If the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy without agreement indorsed or added thereon.*

Other or double insurance exists where there are two or more policies on the same interest and subject, and against the same risk. Insurers need to know the amount of other insurance to enable them to calculate their share of the loss under the *pro rata* clause, and they also generally desire a disclosure on this same point in advance to enable them to determine whether they will accept the risk or not; because a substantial over-insurance of the property might offer a temptation to the insured either to bring about the fire or to be careless in preventing it.

The requirement of the contract is quite reasonable and must be complied with.¹

It must be noticed that insurances of different interests, as for example the policy of a mortgagor and another policy by a mortgagee, are not within the operation of this clause, because they do not constitute double insurance. So also the interests of different mortgagees are distinct,² and the different interests of joint-owners;³ but where warehousemen, common carriers, or bailees generally, and agents, trustees, or co-partners, take out insurance for the benefit of the owners or others interested, and the owners or other parties in interest take out insurance for themselves upon the same subject and against the same

¹ Sanders v. Cooper, 115 N. Y. 279.
Landers v. Watertown Fire Ins. Co.,
86 N. Y. 414; s. c., 40 Am. Rep. 554.
Liverpool, L. & G. Ins. Co. v. Verdier,
35 Mich. 395.

² Fox v. Phenix Fire Ins. Co., 53
Me. 333.

³ Woodbury Sav. Bank v. Charter
Oak F. & M. Ins. Co., 31 Conn.
518.

risk, this constitutes double insurance.¹ Such other insurance for another person would not avoid the owner's policy, unless it appeared that it was taken out by his authority or consent: otherwise it really would not constitute a contract, because the element of mutual assent would be wanting, and the courts are very reluctant to vitiate a policy unless the intent on the part of the insured to procure double insurance is established; for if the insured is not aware of the existence of other insurance, one of the reasons for inserting this clause of the policy is wanting. No temptation to commit arson could be inferred from a fact of which the insured is ignorant.²

In one case it was held that where the consignor effected an insurance with the warranty "no other insurance," and unknown to him the consignees also insured the same goods, the first policy was not avoided.³ But the warranty in the policy being absolute, principle would seem to require, that, if the double insurance really exists by legal authority of the insured, the policy in suit must be held avoided, whether the existence of the double insurance was known to the insured or not.⁴

Policies in which the clause against other insurance does not contain the additional words "valid or invalid" have given rise to much difficulty in cases where two or more policies constituting double insurance contain the same provision. Shall both policies be avoided, or only one, and if only one, which one? There is in each a condition by which the policy containing it ought to be avoided, and yet the moment that either policy is held void, the reason for vitiating the other has ceased to exist.

And substantially the same difficulty arises where the other insurance is in fact voidable at the option of the insurers upon some other ground of forfeiture which renders the policy invalid.

The opinions of the courts upon these questions are varied

¹ Home Ins. Co. v. Balt. Warehouse Co., 93 U. S. 527. Sturm v. Atlantic Mut. Ins. Co., 63 N. Y. 77. Mussey v. Atlas Mut. Ins. Co., 4 Kern. 79.

² London & L. Fire Ins. Co. v. Turnbull, 86 Ky. 230. Doran v. Franklin Fire Ins. Co., 86 N. Y. 635.

³ Williams v. Crescent Mut. Ins. Co., 15 La. Ann. 652.

⁴ Phoenix Ins. Co. v. Copeland, 86 Ala. 551. Van Alstyne v. Ætna Ins. Co., 14 Hun, 360. London & L. Fire Ins. Co. v. Turnbull, 86 Ky. 230.

and irreconcilable. A full presentation of the subject may be found in the last edition of *May on Insurance*, chapter 18.¹

Much of this difficulty would seem to be removed by the insertion, as in the standard form, of the words "valid or invalid," to which force must be given; and when the policy in suit contains them, it should be held vitiated by other insurance, whether void or voidable.²

If, however, a case should arise where the other policy is upon its face absolutely null and void, so as to be no policy at all, but a piece of waste paper, or where the policy, though still existing as a document, has been canceled, or where it has been irrevocably avoided at the election of the insurer issuing it, then, in either case, the conclusion seems to follow that there is within the meaning of this clause no other or double insurance.³

The case of *Stevens v. Citizens Ins. Co.*, 69 Iowa, 658, is thus referred to at page 807 of *May on Insurance*: "It has been held that the clause against other insurance, valid or not, is not violated by a prior policy which had become absolutely void by its terms. It is difficult to see why the words 'valid or not' do not in all common sense cover a void policy."

This criticism of the Iowa case by the learned editor of *May* would be just, if the case had been decided on the ground mentioned by the reporter in the head note. But the reported facts in evidence disclose the important consideration, that, before the policy in suit had been taken out, the property had been removed from the locality in which it was situated when insured by the other policy; and the court was of opinion that this removal without the requisite consent of the insurer took the property altogether out of the operation of the first policy, so that when the second policy was issued there was no double insurance existing upon the property in question.

It is clear that, in the absence of the words "valid or in-

¹ *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325; s. c., 11 Am. R. 125. *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386. *Phenix Ins. Co. v. Lamar*, 106 Ind. 513. *Allen v. Merchants Mut. Co.*, 30 La. Ann. 1386; s. c. 31 Am. Rep. 243.

Thomas v. Builders Mut. F. Ins. Co., 119 Mass. 121; s. c., 20 Am. R. 317. *Fireman's Ins. Co. v. Holt*, 35 Ohio St., 189; s. c., 35 Am. R. 601. ² *Phenix Ins. Co. v. Lamar*, 106 Ind. 513. *Am. Ins. Co. v. Replogle*, 114 Ind. 6.

Lackey v. Ga. Home Ins. Co., 42 Ga. 456.

valid," the prohibition of this clause would extend only to valid other insurance.

The corresponding provision of the Massachusetts policy is as follows :

"This policy shall be void if the insured now has or shall hereafter make any other insurance on the said property without the assent in writing," etc.

§ 139. Factories.—*Or if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days.*

Exactly what constitutes an operating of a factory may not be very easy to define ; but, in general, the evident meaning of the clause is that the active working of the business of the factory must be suspended, to constitute a cessation. Such continuation of the furnace fires, or even of the running of machinery, as could not from the nature of the business be temporarily suspended, is not to be considered prohibited. The mere running of the main shaft at night without any further operation has been held permissible.¹

Running the factory at night after the limit named in the policy avoids it.²

Stopping work without permission even for repairs falls within the prohibition of this clause.³

The Massachusetts policy contains a similar clause, naming nine o'clock P. M. instead of ten o'clock, and thirty days as the limit for cessation of operations.

§ 140. Watchman.—It is sometimes provided that a watchman shall be kept. What is a reasonable compliance with such a provision must often be a question for the jury. Where the clause of the policy required that a watchman must be kept day and night, it was held in a very recent case that the policy was voided because only one watchman was kept in the building. The court concluded that the intent of the

¹ Whitehead v. Price, 2 Cr. M. & R. 447 ; s. c., 5 Tyrwh. 825.

³ Day v. Mill Owners Mut. F. Ins. Co., 70 Iowa, 710.

² Reardon v. Faneuil Hall Ins. Co., 135 Mass. 121.

instrument was that a watchman must be awake, and if there was only one watchman, there would be some portion of the time, presumably, when he would be asleep.¹

The warranty to keep a watchman must be observed.²

§ 141. Increase of Risk.—*Or if the hazard be increased by any means within the control or knowledge of the insured.*

So far as the conduct of the insured himself is concerned, an obligation is said to rest upon him by general principles of insurance law not to enhance the risk.³

This important clause of the policy must receive a reasonable construction. The hazard is of necessity a variable quantity. It constantly changes from day to day, though perhaps imperceptibly, from the operation of the laws of nature and various circumstances beyond the control of the insured. Such influences, and also the acts of persons other than the insured upon or in respect to property other than the insured property, are in general, unless unusual or extraordinary, to be considered as a necessary part of the risk which the insurer has undertaken to sustain. It is not to be supposed that the insured has guaranteed that no improvements or changes shall be made anywhere in the vicinity of the insured property, but it is reasonable to exact an obligation from the insured that he shall not allow himself, or permit others in control of the insured property with his consent, to change its nature or its use in such a way as to make the risk of the insurers materially different from that which they agreed to undertake. Trivial variations in the risk necessarily incident to the use of the insured property are presupposed by the contracting parties to be likely to occur; other changes are not.

This clause binds the assured to make no alteration or change in the structure or use of the property which will substantially increase the risk, and it prohibits him from introducing any practice, custom, or mode of conducting his business which would have the same effect, and also from discontinuing any precaution already used or represented in his application

¹ Rankin v. Amazon Ins. Co., 89 Cal. 210 (1891).

³ Hoffercker v. Newcastle Co. Mut. Ins. Co., 5 Houst. (Del.), 101.

² Bank of Ballston Spa v. Ins. Co., 50 N. Y. 45.

to have been adopted and practiced with a view to diminish risk.¹

Erection of new buildings upon the property insured or adjacent thereto, or any change in the structure of the buildings which makes them more inflammable, or the introduction of new and more hazardous employments or machinery, are likely to avoid the policy unless a disclosure is made to the company, and its consent obtained by written permit.²

The introduction of electric lighting should be disclosed to the company, but the making of ordinary and necessary repairs does not fall within the prohibition of this clause.³

Whether the change amounts to a material alteration in the risk must generally be a question for the jury.⁴

In Iowa it has been held that giving a chattel mortgage amounted to an increase of risk as matter of law;⁵ but this decision is very questionable, and in general the creation of encumbrances, whether voluntary as in the case of mortgages, or involuntary as in the case of tax liens, is not to be considered as increasing the risk within the meaning of this clause, although they might result in increasing the inducement to the insured to destroy his property.⁶

It must be noticed that the requirements of this clause impose upon the insured an obligation which in terms might seem to cover all material changes in the surrounding or adjoining premises; but inasmuch as nothing is specifically said about the adjoining premises, and the word "knowledge" is connected with the word "control," it is doubtful how far the courts would hold the insured responsible for not disclosing changes made by others upon adjacent premises. The only

¹ *Houghton v. Manufrs. Mut. F. Ins. Co.*, 8 Met. 114; s.c., 41 Am. Dec. 489. *Diehl v. Adams Co. Mut. Ins. Co.*, 58 Penn. St. 443; s.c., 98 Am. Dec. 302.

² *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 Comst. 210. *Long v. Beeber*, 106 Penn. St. 466; s.c., 51 Am. Rep. 532. *Williams v. People's F. Ins. Co.*, 57 N. Y. 274. *Cole v. Germania Fire Ins. Co.*, 99 N. Y. 36. *Stokes v. Cox*, 1 H. & N. 320.

³ *Townsend v. Northwestern Ins.*

Co., 18 N. Y. 168. *Lyman v. State Mut. Fire Ins. Co.*, 14 Allen, 329.

⁴ *Shepherd v. Union Mut. Fire Ins. Co.*, 38 N. H. 231. *Ritter v. Sun Mut. Ins. Co.*, 40 Mo. 40. *Insurance Co. v. McDowell*, 50 Ill. 120; s.c., 99 Am. Dec. 503. *Schmidt v. Peoria M. & F. Ins. Co.*, 41 Ill. 295.

⁵ *Lee v. Agricultural Ins. Co.*, 79 Iowa, 379.

⁶ *Judge v. Conn. Fire Ins. Co.*, 132 Mass. 521. *Hosford v. Germania Fire Ins. Co.*, 127 U. S. 399.

safe plan, however, is to bring to the attention of the insurers any alterations in the situation which might affect their estimate of the risk. Sometimes policies contain an express provision in regard to an increase of risk by adjacent buildings or in the use of surrounding premises. It has been held that in such a case no obligation is imposed upon the insured to disclose changes of risk unless they are known by him to increase the risk.¹

Of course, after receiving notice of the change of circumstances, it is optional with the company, under the cancellation clause, to terminate the insurance or not, and after exercising an election the insurer will be bound thereby.

Where the warranty against increase of risk without permission is absolute, the insured is responsible for alterations made by his tenant on the insured property, though without his knowledge or consent.²

If the change of risk is such as to fall within the ban of this provision of the contract, the question is quite immaterial whether or not it was the cause of the loss; for the risk has become other than that which was contracted for, and the contract is void at the option of the insurers.³

According to the weight of authority and reason, then, a temporary increase of risk vitiates the policy and does not simply suspend its operation;⁴ but a contrary rule has been adopted in Illinois.⁵

The clause in the Massachusetts policy is substantially the same.

§ 142. Mechanics.—(1) *mechanics more than fifteen days at any one time.*

The limit of time which has wisely been inserted in this clause tends to make it much more free from ambiguity, and if the insured allows any building or repairing operations to go on

¹ Rife v. Lebanon Mut. Ins. Co., 115 Pa. St. 531.

² Long v. Beeber, 106 Penn. St. 466. Liverpool & L. Ins. Co. v. Gunther, 116 U. S. 113.

³ Daniels v. Equitable Fire Ins. Co., 48 Conn. 105.

⁴ Kyte v. Commercial Union Assur. Co., 149 Mass. 116. Jennings v. Chenango Co. Mut. Ins. Co., 2 Den. 75.

⁵ North British & Mercantile Ins. Co. v. Steiger, 13 Ill. App. 482.

for more than the required time, without a permit, he will of course vitiate his policy.¹

In the Massachusetts policy this subject is not specifically covered, but repairs fall within the operation of the general clause in regard to an alteration in the situation or circumstances affecting the risk.

§ 143. Interest of Insured.—*Or if interest of the insured be other than unconditional and sole ownership.*

This provision is reasonable and valid.²

If the character of the title of the insured to the property is a fee, but he is only a part owner, the policy, of course, is void unless he discloses the fact. Or if, though invested with the legal title, the equitable estate and the right to the legal estate are in another, the policy is voided unless the fact is stated.³

A surviving partner is not the sole and unconditional owner of the undivided partnership estate.⁴

But as a rule any encumbrances or liens upon the property of the insured need not be disclosed under this clause.⁵

And a lease from the insured need not be mentioned;⁶ but under a policy which by its terms required that the "true title and interest" of the insured must be stated, it was held that a mortgage must be disclosed.⁷ A vendee in possession, with an equitable right to the whole title unencumbered, is considered the unconditional and sole owner, although he may not yet have received his deed.⁸ If it is equitably true that the insured is the unconditional and sole owner, the clause will not be held to have been violated.⁹ So where two agreed to carry on a cotton plantation, one to furnish stock, money, and supplies,

¹ Mack v. Rochester German Ins. Fire Ins. Co., 182 Mass. 521. Clay Co., 106 N. Y. 560. Fire & M. S. Ins. Co. v. Beck, 43 Md.

² Barnard v. National Fire Ins. Co., 27 Mo. App. 26. 358.

³ Clay F. & M. Ins. Co. v. Huron Salt & L. M. Co., 31 Mich. 346.

⁴ Crescent Ins. Co. v. Camp, 64 Tex. 521.

⁵ Woodward v. Republic F. Ins. Co., 32 Hun, 365. Dolliver v. St. Joseph F. & M. Ins. Co., 128 Mass. 315; s.c., 35 Am. Rep. 378. Judge v. Conn.

⁶ Ins. Co. v. Haven, 95 U. S. 242.

⁷ Bowditch Mutual Fire Ins. Co. v. Winslow, 3 Gray, 415.

⁸ Bonham v. Iowa Central Ins. Co., 25 Iowa, 328.

⁹ Lebanon Mut. Ins. Co. v. Erb, 112 Penn. St. 149. Martin v. State Ins. Co., 44 N. J. Law, 485; s.c., 43 Am. R. 397.

the other to furnish the plantation and superintend the business, the former to be indemnified for his advances out of the proceeds of the cotton, and the stock and implements used to be equally divided at the end of the year, it was held, that, the cotton not being worth enough to pay the advances, the partner who had made them was the sole and unconditional owner of the cotton but not of the stock and implements;¹ but one who held only a quit claim deed from a second mortgagee was not unconditional and sole owner;² and a purchaser at a sheriff's sale who has not paid the purchase money, there being an outstanding right to claim the premises, has not such an ownership.³ A person in possession of property, with a reservation of title in the seller until payment of the notes given for the purchase price, is not sole and unconditional owner.⁴

Where the use of real estate was contributed as a partner's share of the capital, there being no deed directly or in trust, the firm cannot truly describe the property as belonging to them by an entire, unconditional, and sole ownership.⁵

This clause is not in the Massachusetts policy.

§ 144. Leased Ground.—*Or if building on ground not owned by the insured in fee simple.*

If the insured owns only part of the fee, it has been held that the clause would be violated unless as provided an agreement giving necessary consent is indorsed upon the policy;⁶ or if he has only a life estate;⁷ but if he has the equitable right to a fee simple it has been held that the clause would not be violated, though the special written permission had not been obtained.⁸

This clause is not in the Massachusetts policy.

§ 145. Chattel Mortgage.—*Or if personal property be or become encumbered by a chattel mortgage.*

¹ Noyes v. Hartford Fire Ins. Co., 54 N. Y. 668.

² Southwick v. Atlantic F. & M. Ins. Co., 133 Mass. 457.

³ Security Ins. Co. v. Bronger, 6 Bush. 146.

⁴ Geiss v. Franklin Ins. Co., 123 Ind. 172.

⁵ Citizens' Fire Ins. S. & L. Co. v. Doll., 35 Md. 89; s.c., 6 Am. Rep. 360.

⁶ Scottish Un. & Nat. Ins. Co. v. Petty, 21 Fla. 399.

⁷ Garver v. Hawkeye Ins. Co., 69 Iowa, 202.

⁸ Swift v. Vt. Mut. Fire Ins. Co., 18 Vt. 305.

Except for this restriction, or some provision of the policy expressly indicating that incumbrances must be disclosed, it would not be necessary to state the existence of a chattel mortgage. By the weight of authority it does not constitute a change of interest, title, or possession, or an increase of risk.¹ The dictum to this effect in a recent Iowa case is not to be approved.² But the giving of a chattel mortgage has been held to be an "alteration of ownership,"³ and has also been said to be an "alienation in part."⁴ But this could not be held to be so under the New York standard policy.

This provision also is absent from the Massachusetts policy.

§ 146. Foreclosure.—*Or if with the knowledge of the insured foreclosure proceedings be commenced or notice of sale by virtue of any mortgage or trust deed.*

If the insured obtains such knowledge, of course, he must inform the insurers and give them the opportunity of cancelling the policy if they so desire.⁵

As the decisions are somewhat conflicting in regard to whether giving a mortgage constitutes a change of interest or an increase of risk, it is important to notice that this clause of the standard policy by implication would seem to indicate that giving a mortgage need not be disclosed to the company by virtue of any requirement in the policy, unless under the mortgage a default should have occurred on the part of the insured, and foreclosure proceedings begun.⁶

There are cases suggesting a contrary rule.⁷

This clause is not contained in the Massachusetts form of policy.

¹ Wytheville Ins. Co. v. Stultz, 87 Va. 629 (1891). Hennessey v. Manhattan Fire Ins. Co., 28 Hun. 98. Orrell v. Hampden Fire Ins. Co., 13 Gray, 431.

² Lee v. Agricultural Ins. Co., 79 Iowa, 379 (1890).

³ Edmunds v. Mut. Safety Fire Ins. Co., 1 Allen, 311.

⁴ Abbott v. Hampden Mut. Fire Ins. Co., 30 Me. 414.

⁵ Quinlan v. Providence Washington Ins. Co., 39 N. Y. St. Rep. 810. Titus v. Glens Falls Ins. Co., 81 N. Y. 410.

⁶ Conover v. Mutual Ins. Co., 1 Comst. 291. Judge v. Conn. Fire Ins. Co., 132 Mass. 521. Bishop v. Clay F. & M. Ins. Co., 45 Conn. 480. Shepherd v. Union Mut. F. Ins. Co., 38 N. H. 232. Smith v. Monmouth Mut. F. Ins. Co., 50 Me. 96. Byers v. Farmers Ins. Co., 35 Ohio St. 603; 35 Am. Rep. 623.

⁷ Western Mass. Ins. Co. v. Riker, 10 Mich. 279. McCulloch v. Indiana Mut. Fire Ins. Co., 8 Blackford (Ind.), 50.

CHAPTER XIII.

STANDARD FIRE POLICY—CONTINUED.

§ 147. **Alienation Clause.**—*Or if any change other than by the death of an insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured or otherwise.*

This clause is perhaps not altogether free from ambiguity. It is known as the alienation clause, of which fifty different forms are collected in the last edition of May on Insurance (pp. 552–556), most of which provide for the case of a sale, transfer, conveyance, or alienation of the property under divers forms of prohibitory stipulations. In the earlier policies, like the present Massachusetts standard form, the declaration generally was, that a sale or alienation without written assent should avoid the policy. Under that form of prohibition it was held in many cases that to effect an avoidance of the policy there must be a sale or transfer of the entire interest.

The New York court said: “So long as the insured retains such an interest that he may be a sufferer by the loss, the policy remains valid to protect that interest.”¹

To avoid the effect of such adjudications, which really nullified the clause altogether, some policies were modified so as to prohibit any sale or transfer or change of title or possession, in whole or in part, without written consent. Under such a clause the rule is, that while there cannot be a conveyance of title, or parting with possession in whole or in part, yet an incidental change relating to the title or interest, if it does not alter the character of the interest or ownership of the insured, will not avoid the policy. For instance, giving a real estate

¹ *Hitchcock v. North-western Ins. Co.*, 26 N. Y. 68. *Locke v. North Am. Ins. Co.*, 13 Mass. 61.

mortgage is not a cause of avoidance under such a form of alienation clause,¹ or giving a chattel mortgage,² or placing or incurring other liens upon the property.³

A contract to sell is not a sale under a clause prohibiting alienation;⁴ and, although the new phraseology of this important clause in the standard policy is unfortunately indefinite, the rule understood and acted upon by the companies and the legal profession generally is that a contract to sell unaccompanied by delivery of possession is not "a change of interest." Consequently, until the deed of conveyance passes the legal title, it is not customary to alter the policies of insurance in such a case.⁵

If the prohibition were simply against a sale, a sale in foreclosure before being consummated by the delivery of the deed would not avoid;⁶ but a transfer or assignment in bankruptcy or insolvency, whether voluntary or involuntary, is a change of interest, and unless consented to by the insurer will vitiate the policy.⁷

A deed, though absolute in form, if given only as collateral security, is regarded only as a mortgage under this clause of the policy, and consequently does not avoid it, though given without any written permission of the insurers.⁸ But except as the standard policy provides otherwise, the death of the insured would operate as a change of interest.⁹ And a devise by will is also a change of interest or title.¹⁰

¹ *Conover v. Mutual Ins. Co.*, 1 *Clinton v. Hope Ins. Co.*, 45 N. Y. Comst. 290. *Jackson v. Mass. Mut. F. Ins. Co.*, 23 Pick. 418; s. c., 34 Am. Dec. 69. *Phillips v. Merrimack Mut. Fire Ins. Co.*, 10 Cushing, 350. *Judge v. Conn. Fire Ins. Co.*, 132 Mass. 521.

² *Hennessey v. Manhattan Fire Ins. Co.*, 28 Hun, 98. *Rice v. Tower*, 1 Gray, 426.

³ *Baley v. Homestead Fire Ins. Co.*, 80 N. Y. 21; 36 Am. Rep. 570. *Hosford v. Hartford Fire Ins. Co.*, 127 U. S. 404.

⁴ *Browning v. Home Ins. Co.*, 71 N. Y. 508; 27 Am. Rep. 86. *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6.

⁵ *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176. *Hill v. Cumberland Valley M. P. Co.*, 59 Pa. St. 474. *Washington Ins. Co. v. Kelley*, 33 Md. 421.

⁶ *Haight v. Continental Ins. Co.*, 92 N. Y. 51.

⁷ *Hine v. Woolworth*, 93 N. Y. 75. *Birdseye v. City Fire Ins. Co.*, 26 Conn. 165. *Young v. Eagle Fire Ins. Co.*, 14 Gray, 150.

⁸ *Barry v. Hamburg-Bremen Fire Ins. Co.*, 110 N. Y. 1.

⁹ *Hine v. Woolworth*, 93 N. Y. 75.

¹⁰ *Sherwood v. Agricultural Ins. Co.*, 73 N. Y. 447; s. c., 29 Am. Rep. 180.

The phrase "change of title" has been many times construed, and cannot be held to cover the giving of a mortgage.¹

But in the New York standard policy two very broad words are used in conjunction with each other, "change of interest." It has been said that these words mean "every conceivable change of title or interest."² And, also, in another case it was said that these words were broader than the phrase "sold or conveyed," and must be held to cover a contract to sell which had been partly performed, though the legal title had not passed from the insured.³ A somewhat similar distinction was made in several other cases.⁴ And a standard author, in construing the meaning of the alienation clause, says: "But it must be remembered that this depends entirely upon the language of the policy. If the policy stipulates against any change of title, or alteration therein, or against an alienation *in whole or in part*, a mortgage is held within the prohibition."⁵

It will be found, however, upon an examination of the forms of the policies in respect to which the opinions just cited were given, that they contained nothing which by implication indicated that the disclosure of mortgages was not required; whereas, taking the New York standard policy in its entirety, the rule must be considered clear, that the giving of a mortgage or other incumbrances which are not by terms forbidden, will not avoid the policy though no written consent be indorsed thereon.⁶ •

To convey the property and take back a mortgage amounts to a sale and a change of interest.⁷

This clause must be construed in connection with the character of the property insured, and has no application to a fluctuating stock of goods in a store or factory, which it must be presumed is intended to be sold and replaced from time to

¹ Commercial Ins. Co. v. Spankneble, 52 Ill. 53; 4 Am. Rep. 582. Abbott v. Hampden Mut. Fire Ins. Co., 30 Maine, 414.

² Lappin v. Charter Oak F. & M. Ins. Co., 58 Barb. 325. ⁵ Wood on Fire Ins., 2d ed., p. 719 (note).

³ Germond v. Home Ins. Co., 2 Hun, 540. ⁶ Commercial Ins. Co. v. Spankneble, *supra*. Judge v. Conn. Ins. Co., 132 Mass. 521. Barry v. Hamburg-Bremen Fire Ins. Co., 110 N. Y. 1.

⁴ Western Mass. Ins. Co. v. Riker, 10 Mich. 279. Edmunds v. Mutual Safety Fire Ins. Co., 1 Allen, 311. ⁷ Savage v. Howard Ins. Co., 52 N. Y. 502; s. c., 11 Am. Rep. 741.

time, but the policy usually attaches only to such property as is in the designated locality at the time of loss.¹

Where the insured are joint owners of the property or jointly interested in it, as, for example, in the case of partners or trustees, a transfer from one to another without the introduction of any new person has been held to be no violation of the prohibition of the alienation clause which was formerly in use. This conclusion was put upon the ground that the company having exhibited its willingness to grant insurance to those named in the policy, a mere shifting of interest among them would not be objectionable to the company. The reason for this rule would seem to admit of its application to the case where the parties named in the policy are not joint owners but only jointly insured.²

Whether, under the alienation clause of the New York standard policy, the permission of this rule is applicable at all, or is confined to a case where joint ownership or joint interest exists, or whether it is applicable as between part owners or tenants in common, who have not, strictly speaking, a joint ownership, is not altogether clear, and especially since the recent case of *Walton v. Agricultural Ins. Co.*, 116 N. Y. 326. In that case the policy was issued to Walton and his wife upon a barn the title to which was in Walton at the time of the issuance of the policy, but which Walton told the soliciting agent of the company he was about to convey to his wife. Subsequently, without the written consent of the company, which the terms of this clause of the policy required, Walton conveyed the title through a third person, as a conduit, to his wife. It was held by the Second Division of the Court of Appeals, four justices to three, that the policy was void, on the ground that there had been a breach of "the warranty against a conveyance of the property without the written consent of the company." It is, perhaps, a misfortune that the majority of the court, in their concise opinion, do not state the grounds

¹ *Wolfe v. Security Fire Ins. Co.*, 39 N. Y. 49.

² *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; s. c., 88 Am. Dec. 387. *Powers v. Guardian Fire & Life Ins. Co.*, 136 Mass. 108; 49 Am. Rep. 20.

Peck v. New London Co. Mut. Ins. Co., 23 Conn. 575. *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553. *Walton v. Agricultural Ins. Co.*, 116 N. Y. 326. *Allemania Fire Ins. Co. v. Peck*, 133 Ill. 220.

of their decision with as great particularity as is exhibited by the dissenting opinion of Mr. Justice Bradley. Whether the court based their conclusion upon the words, "if the interest of the parties therein be changed in any manner," or upon the fact that there was no joint interest between the vendor and the vendee, or upon the fact that an intermediary was called in to effectuate the transfer between husband and wife, is not made clear by the prevailing opinion. The change introduced into this clause by the phraseology of the New York standard policy certainly does not tend to the elucidation of this particular question.

A leading author is of the opinion that when the policy provides that any "change of interest" shall void the policy, a sale even by one co-partner or other joint owner to another, will produce a forfeiture.¹ But the ruling was otherwise by the Alabama court.² Another court was of opinion that a division on petition for partition, by one co-tenant against another, was a change in the title, though not strictly an alienation.³

A careful reading of the New York standard policy in its entirety would seem to indicate that there was no intention of restricting the liability of the insurers by the phraseology adopted for this particular clause of the policy; and a distinction may be made between those policies in which the words "change of interest" are added to the ordinary alienation clause, for the purpose of enlarging its meaning, and the case of the New York standard policy, in which the one word "interest" is used as a brief and appropriate substitute for the longer phrases which had previously been employed.

Whatever may be the rule in the case of different part owners, who are not joint owners but are insured jointly, there is no doubt, of course, that the introduction of a new interest or person without permit voids the policy under this clause.⁴

After the loss has occurred, and the risk has terminated, the

¹ Wood on Fire Ins., sec. 357.

⁴ Malley v. Atlantic F. & M. Ins.

² Burnett v. Eufaula Home Ins. Co., 46 Ala. 11; 7 Am. Rep. 581.

Co., 51 Conn. 222. Savage v. Howard Ins. Co., 52 N. Y. 506; s. c., 11

³ Barnes v. Union Mut. Fire Ins. Co., 51 Maine, 110; s. c., 81 Am. Dec. 562.

Am. Rep. 741.

insured may sell or transfer his interest without the consent of the company.

Some policies provide for forfeiture in case the property shall become encumbered in any way without the written consent of the insurer. This has been held to be confined to such encumbrances as the insured voluntarily puts upon his property, and not to tax liens or judgments.¹

A mortgage made on the farm exclusive of the house will not avoid the policy, although the description of the policy in terms covers the farm as well as the house.²

Possession under the alienation clause means, in general, the right to possession, rather than the physical occupancy of the property.

The construction of this clause is generally for the court, though if the material facts bearing upon the question of the interest of the insured are in dispute, the difference of fact may of course raise a question for the jury.

The Massachusetts policy is simpler. It forbids a sale of the property without written assent of the company.

§ 148. Assignment of Policy.—*Or if this policy be assigned before loss.*

Without express prohibition in the policy, it has been held that a fire policy is not assignable except with the consent of the insurer, for a fire policy is peculiarly a personal contract, and does not run with the title to the property.³

In a dissenting opinion in the last case, James, L. J., was of opinion that the contract should be held to run with the title to the land, and inure to the benefit of the owner at the time of loss, whoever he might be.

Marine policies at common law were considered assignable without express consent of the insurers, because of custom and commercial convenience, which made it important that cargoes should pass freely from one owner to another without con-

¹ *Baley v. Homestead Fire Ins. Co.*, 80 N. Y. 21; 36 Am. Rep. 570. *Hosford v. Hartford Fire Ins. Co.*, 127 U. S. 404.

² *Phenix Ins. Co. v. Hart*, 39 Ill. App. 509 (1890).

³ *Lett v. Guardian Fire Ins. Co.*, 125 N. Y. 82. *Rayner v. Preston*, 18 Ch. Div. 1.

sultation with distant insurance companies.¹ But this consideration has never been extended to a fire policy.

A pledge or deposit of the policy as collateral security is not prohibited by this clause.²

By the better opinion it is held that an assignee of a policy need have no insurable interest in the subject of insurance if the policy is originally taken out in good faith, and not issued to the original insured as a mere cover to avoid the statute against wagers.³ But the United States Supreme Court, and some others, have said that the assignee of a policy, as well as the assignor, must have an insurable interest.⁴ It is important, however, to notice, that if the policy is a fire policy, and is assigned without a transfer of the interest or property which it covers, the assignee is merely the designated payee, and he would simply have an equitable lien upon the proceeds of the insurance to which the original insured might be entitled.

Where the property or subject of the fire insurance, as well as the policy, are transferred to the assignee with the assent of the company, a new contract is thus formed between the company and the assignee which will not be disturbed by any subsequent breach of condition on the part of the assignor.⁵ As to the past, however, the assignee simply steps into the shoes of the assignor.

No one except the company can make objection to the assignment from the original insured to the assignee, on the ground that the company's consent was not obtained.⁶

After the risk has terminated by fire, the interest of the insured becomes a *chose in action*, which he has a right to assign, in spite of this clause, without asking permission of the company.⁷ Some of the courts have expressed the opinion that the insurers cannot, by their contract, prevent a transfer of this right of action after the loss has occurred.⁸

¹ Pellas v. Neptune Marine Ins. Co., 5 C. P. D. 34.

² Griffey v. N. Y. Central Ins. Co., 100 N. Y. 417; s. c., 53 Am. Rep. 202.

³ Olmsted v. Keyes, 85 N. Y. 593.

⁴ Warnock v. Davis, 104 U. S. 775.

⁵ Fogg v. Middlesex Mut. Fire Ins. Co., 10 Cush. 337.

⁶ Leinkauf v. Calman, 110 N. Y. 50.

⁷ Mellen v. Hamilton Fire Ins. Co., 17 N. Y. 609. Hall v. Dorchester Mut. Fire Ins. Co., 111 Mass. 53. Imperial F. Ins. Co. v. Dunham, 117 Pa. St. 460.

⁸ Goit v. Natl. Protection Ins. Co.,

25 Barb. 189. West Branch Ins. Co.,

v. Helfenstein, 40 Pa. State, 289; s. c.,

80 Am. Dec. 573. Carroll v. Charter

Oak Ins. Co., 38 Barb. 403.

The Massachusetts policy forbids an assignment without written assent of the company.

§ 149. Memorandum Clause.—*Or if an illuminating gas or vapor, etc.; or, if there be kept, used, or allowed benzine, dynamite, etc.*

These clauses contain memorandum articles, that is, a list of inflammable substances, themselves peculiarly liable to destruction by fire, or likely to involve a loss so extensive that its results cannot easily be made the subject of calculation. The restrictions are proper and must not be infringed except as provided in the contract by written agreement indorsed upon the policy.¹

Where the memorandum clause does not contain the phrase which here appears, "any usage or custom of trade or of manufacture to the contrary," it is permissible to the insured to use the articles prohibited by this general printed clause, provided they were such as naturally pertain to the stock of goods or property described in the written part of the policy. And this is put upon the ground that the written words must control the printed form. Custom may be shown to aid in the application of this rule.²

Thus where a stock of fancy goods was insured with privilege to keep fire-crackers on sale, it was held by the New York court that keeping fireworks would not avoid the policy, although by the printed memorandum clause fireworks were prohibited.³ But the Federal Supreme Court came to the opposite conclusion on the same facts.⁴

And where privilege was given to use the property for a printing office, the keeping of camphene was held to appertain naturally to the permitted business, although camphene appeared in the printed memorandum of prohibited articles.⁵ Similarly in the case of a photographer's stock.⁶

¹ United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio State, 340; s. c., 10 Am. Rep. 735. Barnum v. Merchants Fire Ins. Co., 97 N. Y. 188. Williams v. People's Fire Ins. Co., 57 N. Y. 274.

² Carrigan v. Lycoming Fire Ins. Co., 53 Vt. 418; s. c., 38 Am. Rep. 637.

³ Steinbach v. Lafayette Fire Ins. Co., 54 N. Y. 90.

⁴ Steinbach v. R. F. Ins. Co., 13 Wall. 183.

⁵ Harper v. N. Y. City Ins. Co., 22 N. Y. 444.

⁶ Hall v. Ins. Co. of North Amer., 58 N. Y. 292; s. c., 17 Am. Rep. 255.

It is permissible to show by parol evidence what articles naturally appertain to the property which is the subject of insurance.¹

In spite of the attempt in the standard form to limit this rule of construction, the rule will still prevail, and the only effect of the clause, "any usage or custom of trade to the contrary," will be to impose upon the insured the burden of showing with perhaps greater clearness that the written description fairly covers the prohibited articles in question.²

If the insured allows his tenants, or other persons lawfully in possession of the premises insured, to violate the provisions of the memorandum clause, the policy will be avoided.³

But the requirement of the memorandum clause does not extend to such insignificant quantities of the prohibited articles as one would use for medicine or for cleaning clothes, or for any similar use which must be presumed to be allowed by the contract of insurance in view of the character and use of the property.⁴

The elaborate classification of risks which was formerly indorsed upon many of the policies has been omitted in the standard form.

The memorandum clause of the Massachusetts policy is more liberal to the insured.

§ 150. Vacancy Clause.—*Or if a building, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.*

The addition of a definite length of time, "ten days," is an improvement upon the old form. This provision is quite reasonable and must be observed, inasmuch as the insurers have a right to know whether the subject of insurance is receiving ordinary supervision or is being neglected.⁵

¹ Pindar v. Kings Co. Fire Ins. Co., 36 N. Y. 648; s. c., 93 Am. Dec. 544.

² Birmingham F. Ins. Co. v. Kroeger, 83 Pa. State, 64; s. c., 24 Am. Rep. 147. Whitmarsh v. Charter Oak F. Ins. Co., 2 Allen, 581. Cobb v. Ins. Co. of North Amer., 11 Kansas, 93. Western Assur. Co. v. Rector, 85 Ky. 294.

³ Liverpool & L. Ins. Co. v. Gunther, 116 U. S. 113.

⁴ Wood v. North-western Ins. Co., 46 N. Y. 421. Williams v. People's Fire Ins. Co., 57 N. Y. 274. Carlin v. Western Assur. Co., 57 Maryland, 515; s. c., 40 Am. Rep. 440.

⁵ Hill v. Equitable M. F. Ins. Co., 58 N. H. 82.

In brief, the meaning of this clause is that if the property insured is a dwelling-house it must have an occupant living in it. And in the case of other property it must have that kind of care and superintendence which naturally belongs to the character of the occupancy and property described in the policy.¹ Holding the keys of a house is not occupancy, and this is true though some of the furniture remains in the house.²

The word "unoccupied" has been added to the word "vacant," to give the restriction a broader effect in favor of the insurance company. By a technical construction, "vacant" has been held in New York to mean empty of everything but air, and "unoccupied" to mean that no person is in use or possession of the property.³ Where the building was described as "a store and dwelling," ceasing to use it as a dwelling does not make it unoccupied.⁴

As different classes of property naturally require different kinds of occupancy, the question whether the building is occupied or not may be a question for the jury.⁵

If the property is a factory or mill, it is not necessary that any one should be residing in it at night; but it must be put to some practical and actual use, and not treated simply as a storehouse.⁶

Where a trip-hammer shop was not in operation, but a man visited it almost every day to inspect it, it was held that the policy was avoided, and that such visits did not constitute an occupancy.⁷

But where a schoolhouse was left vacant during the time of the ordinary vacations, and the furniture was not removed, it was held that the provisions of the vacancy clause were not violated.⁸

¹ Halpin v. Phenix Ins. Co., 118 N. Y. 172. Poor v. Humboldt Ins. Co., 125 Mass. 274; s. c., 28 Am. Rep. 228. Rockford Ins. Co. v. Wright, 39 Ill. App. 574 (1890).

² Corrigan v. Conn. Fire Ins. Co., 122 Mass. 293. Litch v. North Brit. & Mer. Ins., 136 Mass. 491.

³ Herrman v. Merchants Ins. Co., 44 N. Y. Superior Ct. 444; s. c., on appeal, 81 N. Y. 184. Herrman

v. Adriatic Fire Ins. Co., 85 N. Y. 162.

⁴ Burlington Ins. Co. v. Brockway, 39 Ill. App. 43 (1890).

⁵ Rockford Ins. Co. v. Storig, 31 Ill. App. 486 (1888).

⁶ Halpin v. Ætna Fire Ins. Co., 120 N. Y. 70.

⁷ Keith v. Quincy Mut. Fire Ins. Co., 10 Allen, 228.

⁸ Am. Ins. Co. v. Foster, 92 Ill. 334; s. c., 34 Am. Rep. 134.

In another case, where a saw-mill was insured, the learned judge who pronounced the opinion of the court held that this could not be intended to be occupied like a domicile, and that a vacancy clause must be construed in view of the situation and character of the property insured, and the contingencies affecting its use, to which property of like character to that insured and similarly situated is ordinarily subject; and that interruptions of business and discontinuance of active use were in such a case to be anticipated, and would no more avoid the policy than would the omission to use a church building during week days.¹ Where a house is only used for taking meals, and a barn only for storing hay, both are unoccupied.² In the case of a saloon, it is enough if a clerk lives in the building and sleeps there.³

Where a ten tenement frame block had two of its tenements occupied, the court was of the opinion that it was not vacant or unoccupied.⁴ But if buildings are separate the condition of the policy is to be applied distributively to them, and the occupancy of one of the buildings named in the policy will not excuse a vacancy in the others.⁵

Vacancy is not *per se* an increase of risk,⁶ and need not be stated unless the policy requires it, or insurers make inquiry upon this point.⁷

If a violation of this clause occurs, the policy is absolutely voided and not merely suspended; but, as in all similar cases, it may be revived by the insurers by some act of confirmation after discovery of the forfeiture.⁸

Before the time limit was added to this clause considerable uncertainty existed as to the length of disuse which would constitute a vacancy, and the conclusion was that a temporary absence from a dwelling-house where the occupants left the

¹ Whitney v. Black River Ins. Co., 72 N. Y. 117, by Andrews, J.; s. c., 28 Am. Rep. 116. Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553.

² Ashworth v. Builders Ins. Co., 112 Mass. 422.

³ Stensgaard v. Natl. Fire Ins. Co., 36 Minn. 181.

⁴ Harrington v. Fitchburg Mut. Fire Ins. Co., 124 Mass. 126.

⁵ Herrman v. Adriatic Fire Ins. Co., 85 N. Y. 163. • Herrman v. Merchants Ins. Co., 81 N. Y. 184.

⁶ Becker v. Farmers' Mut. Fire Ins. Co., 48 Mich. 610.

⁷ Browning v. Home Ins. Co., 71 N. Y. 508; s. c., 27 Am. Rep. 86.

⁸ Moore v. Phenix Ins. Co., 62 N. H. 240. Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335 (1891).

furniture and household goods would not avoid the policy or require a written consent.¹ A permit by the company to leave the house vacant for the summer will be liberally construed as meaning the season broadly rather than the summer months.²

It is not permissible to call experts and ask them whether it increases the risk to leave a house unoccupied;³ and the unambiguous time limit contained in this clause cannot be disturbed by evidence of custom to the contrary in the case of the same or similar property.⁴

By the Massachusetts policy a vacancy for thirty days is permitted without the written assent of the company.

§ 151. Certain Restrictions.—*This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, etc., or by theft, or by neglect of the insured to use all reasonable means to save the property at and after a fire, or by explosion of any kind, or lightning.*

Some of these exceptions to the liability of the insurers may not be at all likely to happen, but if they should happen their results might be so disastrous as to remove them from the operation of any rule of average. "Usurped power" means an armed rebellion. Except for the provision relieving the company from liability for loss "by order of any civil authority," the company would be liable if a building near to that insured were blown up by direction of the authorities to stay the spread of fire.⁵ Theft and explosion have been previously adverted to in § 128.

Whether the insured uses reasonable means to save his property is a question for the jury.⁶

§ 152. Falling Building.—*Or if a building or any part thereof fall except as the result of fire, etc.*

¹ Cummins v. Agricultural Ins. Co. 67 N. Y. 260; s. c., 23 Am. Rep. 111. *Ætna Ins. Co. v. Meyers*, 63 Ind. 238.

² Vanderhoef v. Agricultural Ins. Co., 46 Hun, 328.

³ Luce v. Dorchester Mut. Fire Ins. Co., 105 Mass. 297; s. c., 7 Am. Rep. 522.

⁴ Stone v. Howard Ins. Co., 158 Mass. 475 (1891).

⁵ City Fire Ins. Co. v. Corlies, 21 Wend. 367; s. c., 34 Am. Dec. 258. *Field v. City of Des Moines*, 39 Iowa, 575; s. c., 18 Am. Rep. 46.

⁶ Ellsworth v. *Ætna Ins. Co.*, 89 N. Y. 186. *Briggs v. North Amer. & M. Ins. Co.*, 53 N. Y. 446.

Without this restriction the company would be liable for a conflagration caused by a collapse of the building or a part of it, unless before the fire started the building had lost its character as a building and had become a mere congeries of materials.¹

Where seven days^{*} elapsed between the fire and the fall of the building it was held that the loss by the latter was not the proximate result of fire.²

The Massachusetts standard policy contains no similar provision.

§ 153. Memorandum Articles.—*This company shall not be liable for loss to accounts, bills, currency, deeds, etc., or for property held on storage or for repairs, etc.*

If the property enumerated in this memorandum clause were covered by the policy the insurers would be subjected to claims of uncertain amount and very difficult of verification.

“Storage” means keeping for safe custody to be delivered again in the same condition substantially as when received, and as employed in this clause of the policy the prohibition is applicable only when the storing or safe-keeping is of merchandise for trading purposes and when the storing is the sole or principal object of the deposit. If the goods are merely kept for consumption or sale, the prohibition of this clause does not apply. For example, wine kept in a cellar either to be sold or consumed is not on storage.³ And raw material kept in a factory to be manufactured is not stored.⁴ So if any material is casually or temporarily left in a room.⁵

The Massachusetts policy contains a list of memorandum articles, “bills of exchange, notes, accounts, evidences of property, plate, money, jewels,” etc., but differs widely from the New York clause under consideration.

¹ Nave v. Home Mut. Ins. Co., 37 Mo. 430; s. c., 90 Am. Dec. 394. Fireman's Fund Ins. Co. v. Congregation Rodeph Sholom, 80 Ill. 558. Huck v. Globe Ins. Co., 127 Mass. 306; s. c., 34 Am. Rep. 373.

² Gaskarth v. Law Union Ins. Co., 6 Ins. L. J. 159 (Manchester (Eng.) Civil Court).

³ N. Y. Equitable Ins. Co. v. Langdon, 6 Wend. 623. Hynds v. Schenectady Co. Mut. Ins. Co., 11 N. Y. 554. O'Neil v. Buffalo Fire Ins. Co., 3 Comst. 122.

⁴ Vogel v. People's Mut. Fire Ins. Co., 9 Gray, 23.

⁵ Hynds v. Schenectady Co. Mut. Ins. Co., 11 N. Y. 554.

CHAPTER XIV.

STANDARD FIRE POLICY—CONTINUED.

§ 154. Survey is a Warranty.—*Application, survey, plan, etc., shall be a part of this contract and a warranty.*

The statements of the application are thus incorporated into the contract, and must be construed as a part of it.¹ A mere reference to the application, however, would not be sufficient to make it a part of the contract in such a sense as to incorporate its statements as a warranty.² And if there is any phraseology in the policy which gives the court an excuse for construing the statements of the application as representations rather than as warranties, it is pretty certain to avail itself of it.³ A mere expression of opinion will not be construed as a warranty.⁴ The phraseology of the application, where it is made a part of the contract, may itself limit the conditions of the policy in favor of the insured.⁵ But, as a general rule, as we have already seen, in considering the subject of warranty, all the statements of the application must be literally true, or exactly fulfilled, or the entire contract will be avoided. Whether the fact stated, or the act stipulated for, is material or not is of no consequence.⁶

Any statements in the application, however, which have nothing to do with the subject of the contract, or with the risk, will be held to be immaterial, and will be regarded

¹ Cushman v. U. S. Life Ins. Co., 63 N. Y. 404. Phoenix Ins. Co. v. Benton, 87 Ind. 132. v. New Eng. Mut. Life Ins. Co., 98 Mass. 381.

² Vilas v. N. Y. Cent. Ins. Co., 72 N. Y. 590; s. c., 28 Am. Rep. 186. ⁴ Clapp v. Mass. Benefit Asso., 146 Mass. 519. Wheelton v. Hardisty, 8 El. & B. 232.

³ Houghton v. Manufacturers' Mut. Fire Ins. Co., 8 Met. 114; s. c., 41 Am. Dec. 489. Phoenix Life Ins. Co. v. Raddin, 120 U. S. 133. ⁵ Washington Life Ins. Co. v. Haney, 10 Kas. 525. ⁶ Bennett v. Agricultural Ins. Co., 50 Conn. 420. Ripley v. Aetna Ins. Co., 30 N. Y. 136; s. c., 86 Am. Dec. 362.

as having been gratuitously volunteered. For an innocent error in making them the policy will not be avoided.¹ So, also, in the case of a promissory warranty, circumstances may so change that the warranty will be held to be inapplicable; for example, if a loss occurs before the time for the fulfillment of the warranty has arrived, the loss will, nevertheless, be covered by the policy.² A warranty of the existence of a force pump on the insured premises, at all times ready for use, implies that there is sufficient power to work the pump.³ Where the insured, in answer to the question whether his title to the property was absolute, said "his deceased wife held the deed," it was held that there was a breach of warranty, because the answer was not full and true; the fact being that his wife, in whose employ he had been prior to marriage, had executed in his favor, after marriage, an instrument acknowledging an indebtedness, and stating that it should be a lien upon her property.⁴ Where the insured described his building as "two stories high," the main part of the building in fact being two stories, but a small rear addition being only one story, the inaccuracy was held to be no breach of warranty.⁵ And where the applicant stated that the building to be insured was detached not less than one hundred feet, and the fact was that there was a barn about sixty feet distant from it, the court held that there was no breach of warranty.⁶ A warranty that a room is warmed by a stove, and that the pipe is well secured, means that the room is so warmed, and the pipe so secured, when the stove is in use; but not at other times.⁷ Although the courts have been disposed to relieve the insured, as far as possible, from the consequences of a technical violation of warranty, the legislatures of some States have also interfered by statute, and have provided that misrepresentations, unless material to the risk, shall not avoid the policy.

¹ *Anderson v. Fitzgerald*, 4 H. L. Cas. 484. *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; s. c., 59 Am. Dec. 684.

² *Gloucester Mfg. Co. v. Howard* Fire Ins. Co., 5 Gray, 497; s. c., 66 Am. Dec. 376.

³ *Sayles v. N. W. Ins. Co.*, 2 Curtis (Circuit Court), 610.

⁴ *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47; s. c., 20 Am. Rep. 451.

⁵ *Wilkins v. Germania Fire Ins. Co.*, 57 Iowa, 529.

⁶ *Baldwin v. Citizens' Ins. Co.*, 60 Hun, 389 (1891), by Barnard, P. J.

⁷ *Loud v. Citizens' Mut. Ins. Co.*, 2 Gray, 221.

By a Massachusetts law, any provisions of the application, or of by-laws of the company to become part of the contract, must be set forth in the body of the policy.

This clause is not in the Massachusetts form of policy.

§ 155. Who are Agents of the Company.—*In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company.*

This clause has already been discussed in a previous chapter, under the subject of waiver and estoppel. The stipulation is not void or against public policy, and force must be given to it.¹ If the company makes it true, they can have the benefit of it. The clause is tantamount to a notice in respect to the method the company adopts to give authority to its agents; and if not true, or if in fact the agent has an authority broad enough to waive it, the fact may be shown.² The true doctrine of waiver and estoppel is expounded in two recent cases in New York.³

Agency involves a relation existing between the company and the agent, independent of the policy, which is *res inter alios acta*, and hence the relation may be shown by evidence outside the policy.⁴

The editor of the last edition of May says: "It makes no difference that the policy declares the agent to be the agent of the assured, not of the company. For whom a person is acting is a matter of law on the facts of every case. The application precedes the policy; and to hold that a provision in the after-coming policy, unknown to the assured at the time of application, could turn the insurance agent into *his* agent, when he thought all the time he was dealing with him and accepting his advice as agent of the company, would be an outrage."

Logically speaking, this stipulation should have been

¹ *Marvin v. Universal Life Ins. Co.*, 85 N. Y. 278. *Ins. Co.*, 60 Hun, 389. *Kausal v. Minn. Mut. Fire Ins. Assoc.*, 31 Minn.

² *Insurance Co. v. Norton*, 96 U. S. 17; s. c., 47 Am. Rep. 776. *Partridge v. Commercial Fire Ins. Co.*, 17

³ *Wyman v. Phenix Ins. Co.*, 119 N. Y. 274. *Messelbach v. Norman*, 122 N. Y. 578. *Hun*, 95. *Wilkinson v. Ins. Co.*, 13 Wall. 222. *Williams v. Hartford Ins. Co.*, 54 Cal. 452; s. c., 35 Am.

⁴ *Commercial Ins. Co. v. Ives*, 56 Ill. 403. *Baldwin v. Citizens Fire* 1891). *Rep. 77. May on Ins. p. 272 (3d ed.*

omitted from the conditions of the New York policy, as it is from the Massachusetts standard policy; but, practically speaking, it is an eminently appropriate provision if it is regarded simply as a notice to the insured that it is unsafe to deal with any pretended representative of the company unless he can show his written credentials.¹

Certain States have legislated upon this subject; as, for example, Iowa, the statute of which provides that the soliciting agent shall be held to be the agent of the insurance company, "anything in the application or policy to the contrary notwithstanding." And such statutes are constitutional and controlling, but perhaps unreasonably interfere with the freedom of the parties to settle the terms of their contracts.²

§ 156. Renewals.—*This policy may by a renewal be continued under the original stipulations, etc., provided that any increase of hazard must be made known, etc.*

A policy is often renewed by a short form of receipt which obviates the necessity of issuing a new policy.

The company may make a valid renewal by parol,³ even though the policy should stipulate that a renewal must be in writing.⁴

The renewal constitutes in effect a new contract based upon the same terms and conditions as the old, but for some purposes may be regarded as a continuation of the old.⁵

By mutual consent the new contract may be modified in respect to any of its provisions, as where, for example, the company consents to a change of location.⁶

If the company, knowing of the change of location without express consent, issues the renewal receipt and receives the

¹ Allen v. German Am. Ins. Co., 123 N. Y. 6. Ins. Co. v. Norton, 96 U. S. 234. Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5. Hill v. London Assur. Corp., 26 Abb. N. C. 203.

² Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304. McConnell v. Iowa Mut. Aid Assoc., 79 Iowa, 757. Phil. Fire Assoc. v. New York, 119 U. S. 110.

³ First Bapt. Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305.

⁴ Cohen v. Continental Fire Ins. Co., 67 Tex. 325; s. c., 60 Am. Rep. 24.

⁵ Peacock v. New York Life Ins. Co., 20 N. Y. 293. Hay v. Star Fire Ins. Co., 77 N. Y. 235; s. c., 33 Am. Rep. 607.

⁶ Rathbone v. City Fire Ins. Co., 31 Conn. 193. Kunz v. Amer. Exch. Fire Ins. Co., 41 N. Y. 412.

premium, this amounts to an implied consent to the change of location.¹

But if the terms of the renewal contract are under negotiation and have not been definitely settled, the promise to give a renewal is not yet binding upon the company.²

A parol agreement of or for renewal may be made with the same freedom as a parol agreement for original insurance.

This provision is omitted from the Massachusetts policy.

§ 157. Cancellation.—*This policy shall be canceled at any time at the request of the insured or by the company, by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void, or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short-rate premium, except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.*

There are statutory provisions in New York and elsewhere requiring the companies to cancel on request, and to return the premium less the customary short-rate (see appendix).

Such a statute is compulsory upon the company, and when request has been made to it, this of itself terminates the insurance without any formal cancellation or physical defacement of the policy; but the request to terminate the contract of insurance must be made by the insured or his authorized agent to the insurer, or to one having adequate authority to act in the matter in its behalf; and the request must be actually received. When the request is sent by mail, until it reaches the insurer or its agent the cancellation is incomplete and the policy remains in force.³ The demand for cancellation must be unconditional.⁴

Where, as in the Massachusetts standard policy, it is provided that the insurance is terminable by the company on

¹ Ludwig v. Jersey City Ins. Co., 48 N. Y. 379; s. c., 8 Am. Rep. 556.

² O'Reilly v. Corporation of London Assurance, 101 N. Y. 575. Johnson v. Conn. Fire Ins. Co., 84 Ky. 470.

³ Crown Point Iron Co. v. Ætna Ins. Co., 127 N. Y. 608 (1891).

⁴ Goit v. National Protection Ins. Co., 25 Barb. 189. Griffey v. N. Y. Central Ins. Co., 100 N. Y. 417; s. c., 53 Am. Rep. 202.

giving notice and refunding a ratable proportion of the premium, giving the notice of cancellation is not of itself sufficient, but the policy continues in force until after payment or tender of the return premium.¹

An agent employed merely for the purpose of procuring insurance has no implied authority to cancel.² Notice by the company to a special agent of the insured appointed to procure insurance is not sufficient.³ But notice given to the general agent of the assured is sufficient.⁴

The insertion in the New York policy of the words "by giving five days' notice" is a wise one, and has the advantage of fixing definitely the time at which the policy ceases to be in force after the notice is given, which heretofore has been a vexed question.

By the Massachusetts form the company must give a ten days' notice to the insured.

§ 158. Mortgagee Clause.—*If with the consent of this company an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, etc.*

A form of mortgagee clause is given in the appendix. It is attached to the policy in the form of a rider, and it constitutes a new contract between the company and the mortgagee under the terms and conditions of the policy itself as modified by the provisions of the mortgagee clause.⁵ Where without the mortgagee clause the policy is made payable to a mortgagee, the latter stands in the position of the mortgagor, and can recover only when the latter has incurred no forfeiture.⁶

In case of loss insurers cannot compel the mortgagee to

¹ Van Valkenburgh v. Lenox Fire Ins. Co., 51 N. Y. 465. Lyman v. State Mut. Fire Ins. Co., 14 Allen, 329.

² Insurance Cos. v. Raden, 87 Ala. 311; s. c., 13 Am. St. Rep. 36. Young v. Newark Fire Ins. Co., 59 Conn. 41 (1890).

³ Hermann v. Niagara Fire Ins. Co., 100 N. Y. 411.

⁴ Stone v. Franklin Fire Ins. Co., 105 N. Y. 543.

⁵ Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141.

⁶ Hine v. Homestead Fire Ins. Co., 29 Hun. 84. Harrington v. Fitchburg Mut. Fire Ins. Co., 124 Mass. 126. Grosvenor v. Atlantic Fire Ins. Co., 17 N. Y. 391. Bates v. Equitable Ins. Co., 10 Wall. 33.

have recourse to any remedy against the mortgagor before calling upon them to pay under the policy.¹ That the property still held by the mortgagee as collateral security for his debt is ample security furnishes no defense to the insurers.²

In spite of a mortgagee clause the mortgagor may still avail himself, as between himself and the company, of the reinstatement clause if the company elects to rebuild.³

Sometimes, instead of taking advantage of the mortgagor's policy and attaching to it a mortgagee clause, the mortgagee effects an independent insurance upon his own interest as mortgagee. If he does this without any agreement between himself and the mortgagor, the latter has no interest in the insurance moneys, and cannot compel the mortgagee to apply them toward payment of the debt.⁴ But if the insurance has been procured by the mortgagee on account of the mortgagor, or at his cost, the rule is otherwise.⁵

It has been held that the rights of the mortgagee to the benefits of his insurance become fixed at the time of loss, and that he may recover the insurance though the debt is diminished or paid subsequent to the fire.⁶

The English courts are disposed to enforce more strictly the doctrine of indemnity, and allowed an insurance company to recover back the insurance money which had been paid to the vendor of real estate while still the owner of the building which he had contracted to sell, and before he had received the purchase price. This decision was put upon the ground that the company became subrogated *pro tanto* to the purchase price of the land,⁷ though unpaid at the time of the fire. This case has already been commented upon in the treatment of subrogation. Although the interesting and learned opinions by Justices Brett, Cotton, and Bowen, pronounced in its support, exhibit some vagueness of thought, it would appear to be the doctrine of that case, that, upon paying the loss under the

¹ Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 343; s. c., 14 Am. Rep. 271. Foster v. Equitable Mut. F. Ins. Co., 2 Gray, 216.

² Kernochan v. N. Y. Bowery Fire Ins. Co., 17 N. Y. 428.

³ Hartmann v. Westchester Fire Ins. Co., 75 N. Y. 7.

⁴ McIntire v. Plaisted, 68 Me. 363. Foster v. Van Reed, 70 N. Y. 19; s. c., 26 Am. Rep. 544.

⁵ Waring v. Loder, 53 N. Y. 581.

⁶ Foster v. Equitable Mut. Fire, 2 Allen (Mass.), 216.

⁷ Castellain v. Preston, L. R., 11 Q. B. D. 380.

policy of the vendor, the company took, by subrogation, a vested right in the executory and unperformed contract existing between the vendor and vendee, of the benefit of which it could not be deprived by any action of the parties to that contract. Such a doctrine seems to be unreasonable and inconvenient, and uncalled for by any serious consideration of public policy. The contract of sale was wholly independent of the policy of insurance, and did not affect the company in any way, provided the terms of the policy did not prohibit it. Subrogation could not apply, for the vendee was not a wrongdoer primarily responsible for the loss, nor was his contract made to insure a preservation of the property. It was a mere incident to the property, the legal title and insurable interest in which still resided in the vendor. Any possible future proceeds from the executory contract of sale, if the parties thereto should ultimately decide to carry it out, could not be brought into an estimate of the amount of loss, for the reason that the measure of damages established by the policy was the cash value of the property destroyed at the time of the fire. It often happens that a fire ultimately turns out to be a source of profit to the insured, but this consideration offers no argument in favor of disturbing an insurance adjustment already settled. The general policy of the courts in passing upon questions of insurance law has been not to allow the doctrine of indemnity to obtrude itself inconveniently, provided the contract of insurance is free from suspicion of being a wager at the time of its inception. The English court conceded that the executory contract of sale furnished no defense to the insurers either in full or *pro tanto*.

In the Massachusetts standard a mortgagee clause is inserted in the body of the contract.

CHAPTER XV.

STANDARD FIRE POLICY—CONTINUED.

§ 159. Removal of Property for Safety.—*If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, etc.*

A wise provision, making more definite an obligation of considerable uncertainty; for the general principle obtains, that where a removal is reasonably necessary under the circumstances of the case on account of impending danger by fire, damages resulting from removal are recoverable against the insurer as proximate loss.¹

This provision is not inserted in the Massachusetts form.

§ 160. Notice and Account of Loss.—*If fire occur, the insured shall give immediate notice of any loss thereby, in writing, to this company, protect the property from further damage, forthwith separate, etc.*

This clause is the result of a careful revision of the provisions previously existing in other forms of policies. It is incumbent upon the insured to pay strict attention to the requirements of the contract in this regard, to limit the loss so far as it lies within his power to do so, to give an opportunity to the company to take such measures with promptness as may seem wise to them to effect the same result, and to furnish them with all reasonable evidence to enable them to determine the nature and extent of their loss.²

An "immediate" written notice of loss is required; then afterwards, "forthwith," the damaged and undamaged per-

¹ Whitehurst v. Fayetteville Mut. Ins. Co., 6 Jones (N. C.) Law, 352. 71. Balestracci v. Firemen's Ins. Co., 34 La. Ann. 844.
² White v. Republic Fire Ins. Co., 57 Me. 91; s. c., 2 Am. Rep. 22. Bumstead v. Dividend Mut. Ins. Co., 12 N. Y. 81.
Stanley v. Western Ins. Co., L. R., 3 Ex.

sonal property must be separated and arranged and inventoried, and within sixty days the verified statement must be furnished, giving the required particulars of the property and the loss. The terms "immediate notice" and "forthwith" mean with due diligence under the circumstances of the case, of which the jury will ordinarily be the judge, unless the delay seem to the court so great as to be inexcusable.¹

In one case the court decided that a delay of forty-eight ~~hours~~ in giving the notice of the fire was without excuse, and a non-suit was directed.² In another case, where the policy required immediate proof and notice of loss, a delay of thirty-five days in sending an inventory of loss was considered excusable.³ But, in another case, a delay of eleven days without sufficient explanation was held to be unreasonable.⁴

The policy is, by a previous clause, made payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received. "Satisfactory proof" means proof which ought to be satisfactory.⁵ But it is essential that the proofs should be furnished within the specified time, unless the company waives the requirement.⁶

A proper mailing of a notice of loss is a sufficient compliance with the requirement of the policy, that immediate notice of loss must be given in writing.⁷ Whether the written proofs constitute a compliance with the warranty of the policy, is properly a question for the court.⁸

In regard to the essential conditions of the contract of insurance, we have noticed that insanity or other disability furnishes no excuse for a violation, but this rigid rule is relaxed

¹ Bennett v. Lycoming Co. Mut. Ins. Co., 67 N. Y. 274. Kimball v. Howard Fire Ins. Co., 8 Gray, 33. People's M. Acc. Asso. v. Smith, 126 Pa. St. 317. Kingsley v. New England Mut. Fire Ins. Co., 8 Cush. 393. Rokes v. Amazon Ins. Co., 51 Md. 512; s. c., 34 Am. Rep. 323.

² Brown v. London Assur. Co., 40 Hun, 101.

³ Knickerbocker Ins. Co. v. McGinnis, 87 Ill. 70.

⁴ Trask v. State F. & M. Ins. Co., 29 Pa. St. 198; s. c., 72 Am. Dec. 622.

⁵ Walsh v. Washington M. Ins. Co., 32 N. Y. 427. London Guarantee & Acc. Co. v. Fearnley, 43 L. T. N. S. 390.

⁶ Underwood v. Farmers Joint Stock Co., 57 N. Y. 500.

⁷ Susquehanna Mut. Fire Ins. Co. v. Tunkhannock Toy Co., 97 Pa. State, 424; s. c., 39 Am. Rep. 816. Badger v. Glens Falls Ins. Co., 49 Wis. 389.

⁸ Travellers Ins. Co. v. Sheppard, 85 Ga. 802 (1890).

somewhat in respect to the provisions requiring proofs of loss after the risk has terminated ; and insanity has been held to constitute a sufficient excuse for the omission to serve a preliminary notice of loss upon the company.¹ Furnishing proofs of loss is a condition precedent, and the loss of the policy is no excuse for not performing it.²

If the insured is out of the country, and cannot make the required proofs as stipulated by the policy, it has been suggested that the court might grant relief, at any rate, to the extent of holding that sufficient proofs by an agent constitute a compliance.³

If the company entertains any objection to the proofs on account of technical defects, it must make an objection upon that specified ground, or it will be held to have waived them, provided they relate to matters which upon notice could be remedied by the insured ; and a refusal to pay the policy based upon other grounds is held to imply a waiver of the formal and technical defects in the proofs.⁴

If demanded, plans and specifications must be furnished.⁵ And so also must the required certificate of the nearest magistrate. But the court will not go into a very nice calculation to determine whether one magistrate is a little nearer to the place of the fire than another.⁶ Upon this subject there has been legislation (see appendix).

The requirements of the Massachusetts policy are not so detailed.

§ 161. Exhibit Remains ; Submit to Examinations ; Books of Account, etc.—*The insured, as often as required, shall exhibit to any person designated by this com-*

¹ Insurance Cos. v. Boykin, 12 Wall. 433. Wheeler v. Conn. Mut. Life Ins. Co., 82 N. Y. 543 ; s. c., 37 Am. Rep. 594.

² Blakeley v. Phoenix Ins. Co., 20 Wis. 205 ; s. c., 91 Am. Dec. 388.

³ Walsh v. Vt. Mut. Fire Ins. Co., 54 Vt. 351.

⁴ Priest v. Citizens Mut. Fire Ins. Co., 85 Mass. (3 Allen), 602. Brink v. Hanover Ins. Co., 80 N. Y. 109.

⁵ Fawcett v. Liverpool, London & Globe Ins. Co., 27 U. C. Q. B. 225.

⁶ Daniels v. Equitable Fire Ins. Co., 50 Conn. 551. Amer. Cent. Ins. Co. v. Rothchild, 82 Ill. 166. Tinley v. North Am. Fire Ins. Co., 25 Wend. 374. Williams v. Niagara Fire Ins. Co., 50 Iowa, 561. Dolliver v. St. Joseph Fire & Marine Ins. Co., 128 Mass. 315 ; s. c., 35 Am. Rep. 378.

pany all that remains of any property herein described, and submit to examinations under oath, etc., and produce for examination all books of account, etc.

These provisions confer great privileges upon the insurers, and ought to be enforced by the latter only within bounds of reason and propriety. They are binding upon the insured so far as it lies within his power to comply with them.¹

Under this clause the courts do not require the production of proofs which cannot be produced because they have been destroyed by the fire, or for any reason are beyond the control of the insured.² And if, by diligent effort, duplicate bills, invoices, or vouchers cannot be obtained, their production will be excused.³ But, otherwise, they must be produced.⁴

The company seldom requires the insured to submit to a personal examination, except in those cases where fraud is suspected.⁵ But in such cases this provision of the policy is sometimes of great value to the company, and especially if it is obtained before the insured employs legal advice. If the insured gives false testimony in detail upon his examination had under the terms of the policy, it is generally a source of great embarrassment to him upon the subsequent trial of his law-suit. Upon this preliminary examination the representative of the company finds it particularly desirable to cross-examine the insured in regard to the location of the various pretended items of property said to be in the building at the time of the fire, and also to compel him to state in detail where and when he purchased them. If the property is fictitious, it is very difficult for him to tell a plausible story, and he soon finds himself obliged to have recourse to the suspicious response, that he cannot remember. If he locates the fictitious property in detail, and does not have a copy of his testimony at the subsequent trial months or perhaps years afterwards, he will be very apt, when in the witness chair, to tell an entirely different story.

If he states the times and places of purchases from other

¹ O'Brien v. Comm'l Fire Ins. Co., Council Bluffs Ins. Co., 65 Iowa, 308. 63 N. Y. 108. Titus v. Glens Falls People's Fire Ins. Co. v. Pulver, 127 Ins. Co., 81 N. Y. 410. Claflin v. Ill. 246.

Commonwealth Ins. Co., 110 U. S. 81. ³ Miller v. Hartford Fire Ins. Co., 70 Iowa, 704.

² Mech. Fire Ins. Co. v. Nichols, 1 Harr. (N. J.), 410. ⁴ O'Brien v. Commercial Fire Ins. Co., 68 N. Y. 108.

merchants, the books of the latter will often furnish a check upon his statements.

If the insured absents himself so that he cannot with due diligence be found, this amounts to a refusal to be examined on oath, and after a partial examination, a refusal to continue will have the same effect.¹ But if the company concludes its examination it cannot give a fresh notice, and open up a new hearing.²

Whether the conduct of the insured, upon the examination, amounts to a disobedience of the injunction of this clause, may be a question of fact for a jury.³

The company must demand an examination within a reasonable time, and must not wait until an action has been brought against it under the policy.⁴

In the examination the insured is only bound to answer such questions as have a material bearing upon the insurance and the loss.⁵

Logically, the sufficiency of the examination, and the relevancy of the questions asked, should be for the court.⁶ But, in practice, the courts are very reluctant to dismiss the complaint on such grounds, and generally leave the question of reasonable compliance to the jury, provided the insured has submitted to any sort of an examination.

The Massachusetts policy contains no such provision.

§ 162. Appraisal.—*In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, etc.*

This is called the appraisal or arbitration clause, and is very important to the companies in many instances to relieve them from extravagant or fraudulent claims.

Courts are the legally appointed tribunals for determining controversies, and are jealous of interference with their prerog-

¹ Bonner v. Home Ins. Co., 13 Wis. 677. ⁴ Aurora Fire Ins. Co. v. Johnson, 35 46 Ind. 315.
² Harris v. Phoenix Ins. Co., 35 Conn. 310.

³ Titus v. Glens Falls Ins. Co., 81 N. Y. 410. ⁵ Ins. Co. v. Weides, 14 Maine, 97; s. c., 48 Am. Dec. 514. Wall. 375.

⁶ Phillips v. Protection Ins. Co., 14 Mo. 220. ⁶ North Am. Life & Acc. Ins. Co. v. Burroughs, 69 Pa. State, 43; s. c., 8 Am. Rep. 212.

atives. Any agreement to refer to arbitration the general question of the liability of the insurers under the policy, or all matters of dispute under the policy, is void; for it is held to be against public policy to oust the courts altogether of their jurisdiction.¹

An arbitration clause providing that there shall be two arbitrators and an umpire, without specifying expressly who shall appoint them, has under a strict construction been held invalid. But the provision of the New York standard policy which simply refers to appraisal the question of the amount of loss, leaving any dispute in regard to the company's liability to be determined by the courts, is valid, and a compliance with it is a prerequisite to any right of recovery in an action upon the policy.²

By strict construction against the company, it has been held that an arbitration clause somewhat similar to that in the standard policy is only applicable to property partially injured and cannot be held to cover property totally destroyed.³ Of course the framers of the policy did not intend to have such a distinction made. Evidence relating to property totally destroyed can be presented to arbitrators as well as to courts; with the difference, that juries are generally prejudiced in favor of the insured, and arbitrators are likely to be fairly disinterested.

If the arbitrators go outside the matters submitted to them for determination, their appraisal will not be binding.⁴

If the two appraisers agree, they may act without calling in the umpire.⁵

The Massachusetts standard policy has an appraisal clause substantially the same, except that it is silent as to the expenses of the appraisal, and provides that neither party shall be re-

¹ Delaware & H. Canal Co. v. Penn. Uhrig v. Williamsburgh City Fire Coal Co., 50 N. Y. 250. Reed v. Ins. Co., 101 N. Y. 362. Hamilton Washington Ins. Co., 138 Mass. 575. v. Home Ins. Co., 137 U. S. 370, Clement v. British Am. Assur. Co., 386. Morley v. Ins. Co., 85 Mich. 141 Mass. 293. Hurst v. Litchfield, 210 (1891). 39 N. Y. 377. Scott v. Avery, 20

English Law & Eq. 327; s. c., 5 H. L. Hun, 172.

Cases, 811.

⁴ Skipper v. Grant, 10 C. B. N. S.

² Seward v. City of Rochester, 109 237.

N. Y. 164. Hamilton v. Liverpool, ⁵ Enright v. Montauk Fire Ins. Co., L. & G. Ins. Co., 136 U. S. 242. 40 N. Y. State Rep. 642.

quired to choose or accept any person as referee who has served as a referee in any like case within four months.

§ 163. Enforcing Contract is no Waiver.—*This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, etc., relating to the appraisal or examination; and the loss shall not become payable until sixty days after the notice of ascertainment, estimate, and satisfactory proofs have been received, including an award by appraisers when appraisal has been required.*

As has been noticed, the courts in some instances have been disposed to construe as a waiver of a known cause of forfeiture any demand for an appraisal or examination of the assured or the appraisal;¹ but this clause of the policy allows the company to pursue the contract methods for ascertaining the character and extent of the loss before exercising its option to decide whether or not it will contest the claim of the insured. And the provision that the loss is not payable until after the award by the appraisers makes it clear, under the decisions of the courts, that a compliance with the appraisal clause is not simply directory, but is a condition precedent to any right of action under the policy.

The Massachusetts standard form does not contain this clause.

§ 164. Pro Rata Clause: Other Insurance.—*Shall not be liable for greater proportion of any loss than the amount hereby insured shall bear to whole insurance, whether valid or not, or by solvent or insolvent insurers; and the extent of the application of the insurance under this policy, or of the contribution to be made by this company, may be provided for by agreement attached hereto.*

This provision relates to double or other insurance which has been already defined, and not to insurances of different interests though upon the same property.²

¹ *Morley v. Ins. Co.*, 85 Mich. 210 (1891). *Hamilton v. Home Ins. Co.*, 137 U. S. 370 (1890). *55 N. Y. 222*; s. c., 14 Am. Rep. 239. *Acer v. Merchants Ins. Co.*, 57 Barb. 68. *Titus v. Glens Falls Ins. Co.*, 81

² *McMaster v. Ins. Co. of North Am.*, N. Y. 415.

Thus, if a mortgagor insures his interest, and a mortgagee, either by a separate policy or by a mortgagee clause attached to the mortgagor's policy, insures his interest on the same property, there is no double or other insurance. But if the mortgagor's policy is simply made payable to the mortgagee without a mortgagee clause, and the mortgagor should take out another policy upon the same property and against the same risk, it would constitute a case of double insurance.¹

The object of this clause of the policy is to prevent circuitry of action. Without it, in any case of double insurance, as we have seen, the insured might bring his action against any one company for the whole amount of loss up to the extent of the policy, leaving the co-insurers to settle their respective obligations under the equitable doctrine of contribution. But under the limitation of this clause, the insured can sue one company only for its ratable proportion of the loss, and therefore the right of contribution among the co-insurers becomes available to them only in case of over-insurance.

If one company pays to the insured either more or less than its proper share, the other companies are still liable to the insured for the amount of their respective obligations as fixed by their own contracts respectively.²

When the different policies contain similar terms, and are concurrent, there is little difficulty in dividing the loss proportionately among them; but when the policies cover in part the same, and in part different property, and contain different and inconsistent provisions applicable to the one loss, it may readily be seen that it is simply impossible to adjust the loss in strict conformity to the requirements of their repugnant conditions. The problem of adjusting such losses often becomes one of grave perplexity and difficulty, and is not always understood by the judges, who, no matter how learned they may be in the law, are often insufficiently familiar with the business of insurance and the science of mathematics to be able to master the situation even to their own satisfaction.

The Missouri court, in a case of this character, summed up

¹ *Hine v. Woolworth*, 93 N. Y. 75. ² *Conn. Fire Ins. Co. v. Mer. & Van Alstyne v. Aetna Ins. Co.*, 14 Hun, Mech. Ins. Co., 15 Ins. L. J. 615 (Va. 360. *Hastings v. Westchester Fire Ins. Apl.* 15, 1886).
Co., 73 N. Y. 141.

the reasons for the conclusion at which it had arrived in an apportionment of loss between insurance companies, in the following words: "We are strengthened in this conclusion by the fact that F. L. Ridgely and George K. McGunnegle, who have very great experience in the business of underwriting in St. Louis, *having been consulted in reference to this case*, concurred in recommending the same adjustment."¹

A practical insurance man has given a number of rules, more or less inconsistent with one another, which have been prepared by various persons in the trade to aid in arriving at a proper adjustment by contribution.²

The same writer says: "The contribution clause, like contribution under the old form, is held to be operative only between the companies in case of double insurance, and between policies containing it; and then only when the concurrent insurance exceeds the general loss. . . . The liability of co-insuring companies under this clause is based upon the degree of concurrency of the policies, and is restricted to the ratable proportions of the loss, within the amount of the concurrent insurance; though some of the policies may cover other property in addition to that destroyed, or protect specific items not embraced in any of the others."³

The questions arising under this clause are so frequently settled by the companies in an amicable adjustment that the scope of this book will not admit of an elaborate discussion of the subject; but certain principles may be named which the courts have endeavored to apply in the settlement of inconsistent provisions contained in the various policies.

1. The different policies are placed as far as possible upon an equality, and special conditions and limitations in one policy are not brought over into another policy.⁴

2. The object of the contribution clause is construed to be the restriction of the amount recovered from each insurer to its equitable contributory share, and must not be permitted to operate so as to reduce the aggregate amount of indemnity which the insured might otherwise recover. No arrangement

¹ Angelrodt v. Del. Mut. Ins. Co., 31 Mo. 598.

² Griswold's Fire Underwriters' Text Book, pp. 745 *et seq.*

³ Griswold's Fire Underwriters' Text Book, p. 713.

⁴ Howard Ins. Co. v. Scribner, 5 Hill, 298.

of the clauses in the policy shall be used to the disadvantage of the insured. He must be paid, and the dispute, if any, settled among the underwriters.¹

Lord Mansfield said: "In no case must the contribution clause be construed in such a manner as to throw loss upon the insured, against which he would have been fully protected had the policies been free from that clause."²

In an interesting apportionment by the arbitration committee of the New York Board of Fire Underwriters, growing out of a recent fire in the Rossiter stores in New York City, the arbitrators laid down three principles which they considered fundamental.

"(1) That the insured shall not suffer by non-concurrence of policies, if the aggregate of the insurance exceeds the loss. (2) That a co-insurance clause serves its purpose if it is a guaranty that at least the benefits of full insurance are secured. (3) That a floating policy, with condition that it shall not attach until all specific insurance is exhausted, cannot be held by reason of non-concurrence of specific policies, save for the excess of the aggregate amount covered by all such non-concurrent policies."³

But to constitute double insurance it is not necessary that the persons insured under the different policies should be named by the same description. For example, if a warehouseman takes out insurance upon the goods stored with him as a bailee, not only for his own benefit but on account of whom it may concern, or by any designation for the benefit of others interested in the same property, provided such other persons have either given original authority for the procuring of the insurance or have subsequently ratified it, the policy covers their interest as well as the interest of the warehouseman, it being shown that such other persons were within the contemplation of the parties to the contract at the time when it was

¹ Lucas v. Jefferson Ins. Co., 6 Cow. 835. Mercantile Ins. Co. v. L., L. & G. Ins. Co., 5 Ch. Div. 569. Ill. Mut. Ins. Co. v. Hoffman, 132 Ill. 522. Balto. Fire Ins. Co. v. Loney, 20 Md. 20.

² Godin v. London Assurance Co., 1 Burr. 489. Co. v. Hoffman, 132 Ill. 522. Balto. Fire Ins. Co. v. Loney, 20 Md. 20.

³ Ogden v. East River Ins. Co., 50 N. Y. 388; s. c., 10 Am. Rep. 492. Hale v. Dorchester Mut. F. Ins. Co., 12 Gray, 545. Sloat v. Royal Ins. Co., 49 Pa. State, 14; s. c., 88 Am. Dec. 477. Lowell Mfg. Co. v. Safeguard Fire Ins. Co., 88 N. Y. 591. North British &

made; and in that case a policy by the owners or the other persons in interest will constitute other or double insurance.¹

§ 165. Reinsurance.—*Liability for reinsurance shall be as specifically agreed hereon.*

When an insurer finds it prudent or convenient to protect himself from loss by reason of any liability he has assumed under a policy, he may contract with another company to relieve him from that liability by a policy of reinsurance. Except as to the matter of premium, which may be more or less than that paid on the original policy, the insurer takes upon himself the rights, duties, and obligations of the original insurer.

A company sometimes has all its risks reinsured by another company or other companies. A preliminary contract is generally exchanged providing that the policy of insurance shall issue on a certain date, and meanwhile a schedule of the risks is prepared which is to be attached to the policy of reinsurance. With the exception of this schedule, which may cover in brief form thousands of policies, the policy of reinsurance is generally like an ordinary policy of insurance. It constitutes a new contract, and is to be governed by the law of the place where it is made; but it is based upon the representations made at the time of the original insurance.²

The original insurers are governed by the ordinary rules relating to concealment, and must make a fair disclosure to the reinsurers of material facts concerning the risk.³

The statute of frauds is not applicable to the contract of reinsurance, nor is it an agreement to answer for the debt of another.⁴

The contract of reinsurance is an indemnity against liability for loss, and consequently, as soon as the liability of the first insurer has actually accrued, it may bring suit against the reinsurer before an actual payment of the loss. And so also the reinsurer may be obliged to pay the original insurer the amount of its liability, although the latter may have become

¹ Home Ins. Co. v. Baltimore Warehouse Co., 107 U. S. 485. N. Y. Bowery house Co., 93 U. S. 527. Fire Ins. Co. v. N. Y. Fire Ins. Co.,

² Cohen v. Cont'l Life Ins. Co., 69 N. Y. 300. 17 Wend. 359.

⁴ Bartlett v. Fireman's Fund Ins.

³ Sun Mut. Ins. Co. v. Ocean Ins. Co., 77 Iowa, 155.

insolvent, and although it may ultimately be unable to pay its indebtedness to the insured.¹

But if, before having recourse to the reinsurer, the first insurer pays or adjusts its loss, or compromises it so as to fix its amount, this amount will limit its right of recovery against the reinsurer.²

If the original insurer through mistake pays to the insured a larger amount than it was bound to pay, the liability of the reinsurer will not be thereby increased unless the form of the contract of reinsurance permits it, or unless the amount paid was fixed by a judgment. The original insured cannot bring suit against the reinsurer unless the contract of reinsurance stipulates that he may, for otherwise no privity exists between the original insured and the reinsurer.³ Any defense which is available to the original insurer may also be raised by the reinsuring company.⁴ The provision of the policy in respect to other insurance is held to mean other reinsurance.⁵

Sometimes policies of reinsurance cover risks as existing on a certain date, and in other policies the reinsurers are not careful to insert such a limitation. The difference between these two forms of contracts may be very important. For under the first form, if the original insurers or their agents change the risk, as frequently happens, by an express or constructive consent, for example, to a removal of the property to a new locality, or a change of partners, or an assignment of the policy, the reinsurers will be discharged from liability. Whereas without such limitation the reinsurers would be liable, notwithstanding such waivers or privileges as the original insurers might see fit to extend to the insured under the policies.⁶

The practice is for the original insurer, if sued by the in-

¹ *Mutual Safety Ins. Co. v. Hone*, *Protection Ins. Co.*, 1 Story, 458.

² *Comst.* 235. *Blackstone v. Alemania F. Ins. Co.*, 56 N. Y. 104. *Gantt Ind.* 413.

³ *Amer. Cent. Ins. Co.*, 68 Mo. 503. ⁴ *Mutual Safety Ins. Co. v. Hone*, 2 *Comst.* 235.

⁵ *Insurance Co. v. Insurance Co.*, 38 *Ohio State*, 11; s. c., 43 *Am. Rep.* 413. ⁶ *Manufacturers Fire & Marine Ins. Co. v. Western Assur. Co.*, 145

⁷ *Glen v. Hope Mut. Life Ins. Co.*, 56 N. Y. 379. *Mass.* 419. *Faneuil Hall Ins. Co. v. L., L. & Globe Ins. Co.*, 153

⁸ *N. Y. State Marine Ins. Co. v. Mass.* 63.

sured, to give the reinsurer an opportunity to come in and defend the suit at the expense of the latter. If the reinsuring company declines to do this, it will be liable for the reasonable costs of the suit.¹

The provision of the policy, requiring an appraisal and limiting the time within which a suit may be brought, has been held to have no application to a contract of reinsurance.²

The Massachusetts policy is silent upon this subject.

§ 166. Subrogation.—*Subrogation of rights to the extent of payment shall be assigned to the company.*

The common law right of subrogation has been already considered. It grows out of the principle of indemnity, and has an equitable basis in that the negligent person who caused the loss and who is primarily liable ought to be made ultimately responsible for the damage sustained.³

The insured in the first instance has his option between two forms of remedy. If he pursues his remedy against the wrong-doer and recovers compensation, the insurance company will escape. But if he chooses first to enforce his claim against the insurance company, the latter is entitled, by way of subrogation, to have recourse over against the guilty party for compensation.⁴

Consequently, the wise course for the insured to adopt ordinarily is to recover his insurance moneys in the first instance before instituting any suit against the wrong-doer.

Inasmuch as the insurance company is entitled to the right of subrogation, the insured will not be permitted to defeat that right by releasing the wrong-doer or compromising with him to the prejudice of the insurance company without the consent of the latter.⁵

The provision of the policy requiring the insured to make a formal assignment *pro tanto* of any rights that he may have

¹ N. Y. State Marine Ins. Co. v. Protection Ins. Co., 1 Story, 438.

² Jackson v. St. Paul F. & M. Ins. Co., 99 N. Y. 124. Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 446.

³ Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397.

⁴ Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397. Insurance Co. of N. A. v. Fidelity, &c. Co., 123 Pa. State, 523; s. c., 10 Am. St. Rep. 546.

⁵ Conn. Fire Ins. Co. v. Erie Ry. Co., 73 N. Y. 399; s. c., 29 Am. Rep. 171.

against the negligent person or corporation enables the insurance company without any question, under the codes of procedure, to institute action against the wrong-doer in their own name. Insurance companies, however, having regard to the prejudice which juries are apt to exhibit towards corporations, sometimes make an arrangement with the insured whereby it is agreed that a suit shall be brought in the name of the insured against the wrong-doer for the whole amount of damage sustained, and that the proceeds of the suit and expenses shall be apportioned between the insured and the insurers under some stipulated arrangement. Sometimes the insurance money is paid before the suit, and sometimes not until after its termination. In such a case the insurance company does not take any assignment. It has been held that the wrong-doer who is sued for negligently causing the fire cannot make a defense out of the payment of the insurance money to the insured by the insurance company, because the policy is *res inter alios acta*.¹

Except as varied by express agreement, the insurer has no rights against the wrong-doer other than those vested in the insured, and the company cannot enforce those until it has admitted its liability under the policy.²

The insurers can recover only what they have paid under the policy.³

Sometimes the insurers take an assignment of the whole amount of the claim for damages belonging to the insured, although this exceeds the amount paid on the policy. This is not equitable, and no company would be apt to insist upon such a form of assignment if the insured made objection to it.

A common carrier may, by agreement with the owners, secure to himself the benefit of any insurance effected by the owner of the goods, and in the absence of fraud such an agree-

¹ Conn. Fire Ins. Co. v. Erie Ry. Co., 73 N. Y. 399; s. c., 29 Am. Rep. 171. Weber v. Morris & Essex R. R. Co., 35 N. J. Law, 413; s. c., 10 Am. Rep. Monmouth Co. Mut. F. Ins. Co. v. Hutchinson, 21 N. J. Eq. 107. Hard- 253.

ing v. Townshend, 43 Vt. 536; s. c., 5 Am. Rep. 304. Hayward v. Cain, 105 Mass. 213. Monticello v. Molli- 210. ² Midland Ins. Co. v. Smith, 6 Q. B. D. 561. Phoenix Ins. Co. v. Erie & W. Tr. Co., 117 U. S. 312; s. c., 118 U. S.

son, 17 How. 152. Clark v. Wilson, 103 Mass. 221; 4 Am. Rep. 532. ³ Holbrook v. U. S., 21 Ct. of Claims, 434.

ment defeats any right of subrogation which otherwise the insurers might have.¹

If the bill of lading provides that a common carrier on incurring liability shall have the benefit of the insurance on the goods, the insurer will have no right of suit by way of subrogation, for the insurer can only take such rights as belong to the insured at the time of loss.²

An agreement in a bill of lading that the carrier, if he incurs liability by loss or damage to goods, shall have the benefit of any insurance on them is not within the prohibition of a clause in the policy against selling, transferring, or pledging the interest of the insured in the policy.³

The mortgagee clause gives to the insurer a right of subrogation.

If the insured has a contract right against his lessee to make good the damage for which he receives payment from the insurers, the latter, according to the English view, will be subrogated to that right.⁴

The Massachusetts policy contains a subrogation clause.

§ 167. Proximate Loss : Spread of Fire.—It not infrequently happens that the fire which causes the loss to the property of an insured person is negligently started by a common carrier or other person on premises more or less distant from the property of the insured. The insurers, upon paying the loss, thereupon become subrogated to the rights of the insured against the wrongdoer, under the doctrine which has just been explained.

The prosecution of these rights often involves the difficult question, in respect to the spread of the fire, how far the damages caused thereby are to be attributed to the negligence of the wrong-doer as a proximate cause. The proximate cause is the efficient, controlling cause which produces the effect without the intervention of any new and extraordinary agency.

¹ *Mercantile Mut. Ins. Co. v. Calebs*, 20 N. Y. 173. ³ *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508 ; s. c., 52 Am. Rep.

² *Platt v. Richmond Y. R. & C. R.* 728. ⁴ *Darrell v. Tibbetts*, 5 Q. B. D. R. Co., 108 N. Y. 358. *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508 ; 560. s. c., 52 Am. Rep. 728.

It is to be determined not so much by any relationship of propinquity in time or space, as by the intimacy of connection between the negligent act and the resulting consequences.

Thus, results are proximate, whether to be foreseen or not, which follow the cause without any unusual disturbance in the operation of the laws of nature. If an efficient, adequate cause is found to account for the result, it must be deemed the true cause, unless some other, not incidental to it but independent of it, is shown to have intervened between it and the result.

It is natural for fire to spread so long as there is anything near at hand to burn, and the dangerous character of this element presents no excuse for imprudence in its use. Though the number of sufferers from a conflagration may be very many, and the extent of the damage very great, this offers no reason for shifting the burden of loss from those who are guilty to those who are innocent.

The extent of proximate loss ought not to be bounded by any limits of ownership, nor confined within any arbitrary walls, unless such boundaries are of such a character that they must be expected to prevent its extension. Whether the extent of the loss, under all the circumstances of the case, is remote or reasonably proximate is ordinarily a question for the jury.¹

In *Ryan v. N. Y. Central R. R. Co.*,² it was held that where a house in a populous city takes fire through the negligence of the owner or his servant, and the flames extend to and destroy an adjacent building some one hundred and thirty feet distant, the owner of the first building is not liable to the owner of the second building for the damage sustained thereby.

So far as the *Ryan* case stands for the proposition that where the facts, with respect to the question of proximate cause, are sufficiently plain they present a question of law for the court, its doctrine has been very recently approved by the Court of Appeals.³

But as an exposition of the law, applicable in general to the question of proximate loss by the spread of fire, it is opposed by the current of judicial opinion, and has been so far

¹ *Milwaukee, &c., R. R. Co. v. Kellogg*, 94 U. S. 469.

² 35 N. Y. 210.

³ *Read v. Nichols*, 118 N. Y. 229.

distinguished by the courts of the same State as to have lost much of its authority.¹

The course of reasoning exhibited in the opinion of the court must have had its origin in a feeling of sympathy in view of the momentous consequences which might be involved in the negligent use of fire, rather than in any sense of justice.²

§ 168. Limitation of Time to Sue.—*No suit or action shall be sustainable until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.*

A compliance with all the provisions of the contract is expressly made a condition precedent. Without this provision, it had been said that the appraisal clause was an independent and collateral agreement, and that suit might be brought by the insured upon the policy without complying with the requirements of the appraisal clause.³

The limit of one year for bringing suit is valid, and must be observed, and under the wording of this clause the twelve months begin to run from the time of the fire,⁴ and not from the time of service of proofs of loss, which, under the former wording of the policy, was held to be the effect of it.⁵

A provision limiting the insured to a particular place or forum for his action at law would be invalid.⁶

The Federal Supreme Court was of opinion that the intervention of war would override this clause of the policy.⁷

The Massachusetts clause names as the limit of time for bringing suit two years from the time the loss occurred.

Some of the States have passed statutes upon this subject. (See appendix.)

¹ Webb v. Rome W. & O. R. R. Co., 49 N. Y. 420. Tanner v. N. Y. Central Co., 108 N. Y. 623. Hine v. Cushing, 53 Hun, 519.

² Perley v. Eastern R. R. Co., 98 Mass. 418; s. c., 96 Am. Dec. 645.

³ Hamilton v. Home Ins. Co., 137 U. S. 370. Reed v. Washington Ins. Co., 138 Mass. 572.

⁴ King v. Watertown Fire Ins. Co., 47 Hun, 1.

⁵ Steen v. Niagara Fire Ins. Co., 89 N. Y. 315; s. c., 42 Am. Rep. 297.

⁶ Nute v. Hamilton Mut. Ins. Co., 6 Gray, 174.

⁷ Semmes v. City Fire Ins. Co., 13 Wall. 158.

§ 169. Mutual Companies.—*If this policy be made by a mutual company having special regulations, such regulations shall form a part of the policy as the same may be written or printed upon, attached or appended hereto.*

The regulations or by-laws of mutual companies often affect the particulars of the contract. These regulations are binding upon the policy holders, who in mutual companies constitute the members of the company, and some of the courts have held that they were peculiarly and conclusively binding, to such an extent that even the officers of the company would have no authority to waive them where they constitute essential provisions of the contract.¹

This direction of the standard policy wisely and equitably provides that such regulations must be disclosed in connection with the contract itself.

This clause does not appear in the Massachusetts policy, but the Massachusetts public statutes and the statutes of other States provide that provisions of the by-laws or the application which form a part of the contract must be set forth in the policy.

§ 170. Last Clause of the Policy—Authority of Agents to Waive.—The importance of this clause to the insurance companies is illustrated by the frivolous and oftentimes false testimony by which, under the doctrine of waiver and estoppel, the essential conditions of the written policy are subverted. The provisions of the clause are not invalid upon their face or contrary to public policy, and are to be enforced, except as the facts amounting to a waiver of the clause itself, or to an estoppel against the company, are clearly established.²

But the embarrassing question arises whether a clause which provides for an exclusive method of waiver may itself be waived in some other manner; in other words, how far the doctrine of waiver and estoppel derives its sanction from a rule of law independent of the contract and superior to it. This question has already been discussed and illustrated by a numerous citation of authorities in Chapters VII. and VIII.

¹ *Brewer v. Chelsea Mut. Fire Ins. Co.*, 14 Gray, 208. *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 21.

² *Allen v. German Amer. Ins. Co.*, 123 N. Y. 6 (1890). *Messelbach v. Norman*, 123 N. Y. (578 1890).

The clause seems to have been framed with reference to the ruling in *Walsh v. Hartford Fire Ins. Co.*,¹ which held that a somewhat similar stipulation in the policy operated to curtail the more ample ostensible authority vested in the agent. But in that case the agent was not an officer, and the clause of that policy did not purport to prevent all possible representatives of the company from granting a waiver, nor was any testimony adduced by the plaintiff showing that the company had allowed its agent to exercise a broader authority than that defined by the policy.

This clause of the standard policy is ingeniously worded in an attempt to abolish altogether the doctrine of parol waivers established by law; and in a recent case, rightly decided upon its facts, the New York Court of Common Pleas apparently were of opinion that this result had been accomplished.² Such also appears to be the doctrine of the Massachusetts court.³ But for the reasons already given it seems to accord better with the current of authority to say broadly that the insurers may, in spite of this contract stipulation, effect an oral waiver through their agent as to this or any other clause of the policy, provided, as a matter of fact, the agent has the requisite authority as defined by the relations existing between the company and himself.

The clause in question purports to cover two points which are quite distinct and ought to have been kept distinct: (1) The authority of the agent, which is properly the subject of a notice rather than a stipulation; and (2) the method of exercising that authority, which it is altogether appropriate to incorporate into the contract as one of its conditions.

The prevailing opinion with reference to the first point, as we have seen, appears to be that such notice or stipulation is not binding upon the insured during the preliminary negotiations or execution of the application, unless it is inserted in the application itself;⁴ as to the second point, it has repeatedly been

¹ 73 N. Y. 5.

³ *Kyte v. Commercial Union Assur.*

² *Hill v. London Assur. Co.*, 16 Co., 144 Mass. 46.

Daly, 120; see also the later well-considered opinion of Judge McAdam in 128 Pa. St. 553; s. c., 15 Am. St. Rep. 696.
New York, 26 Abb. N. C. 203.

⁴ *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553; s. c., 15 Am. St. Rep. 696.

held that it may be waived by parol by any representative of the company who has in fact sufficient authority. Lately this was decided by the Second Department of the Supreme Court of New York upon a construction of this identical clause.¹

The practical result in New York amounts very much to this, that as to the ordinary commissioned or so-called general agents of fire companies, the policy restriction or stipulation is generally conclusive evidence of their limited powers after it is received, so far as effecting waivers is concerned, inasmuch as in most cases the insured is unable to produce any testimony which will avail to establish a broader authority than that defined by the policy. But in the absence of special action by the directors, the officers of the company are held to have the same authority, to control and vary their contracts, which they possessed before a standard form of policy was filed in Albany by the committee of the New York Board of Fire Underwriters.²

This clause is omitted from the Massachusetts policy, but it must be remembered that the Massachusetts courts have shown much less indulgence to the insured in the application of the doctrine of waiver and estoppel as regards proceedings whether antecedent or subsequent to the inception of the contract.³

¹ *Baldwin v. Citizens Ins. Co.*, 60 297. *Ward v. L. & L. Fire Ins. Co.*, Hun, 389 (1891), by Barnard, P. J. 116 N. Y. 106. *Pechner v. Phenix Ins. Co.*, 61 Hun, 118 (1891). See also *Baumgartel v. Prov. Wash. Ins. Co.*, 65 N. Y. 207.

² *Baldwin v. Citizens Ins. Co.*, 60 Hun, 339. *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315; s. c., 42 Am. Rep. ³ *Kyte v. Commercial Union Assur. Co.*, 144 Mass. 43. *Batchelder v. Queen Ins. Co.*, 135 Mass. 449.

CHAPTER XVI.

LIFE INSURANCE POLICY.

IN life insurance there is no standard form of policy, and the different companies use forms which vary considerably, and which are more or less favorable to the insured, as the case may be.

The Equitable of New York has adopted a very short form of policy, which, after providing for the payment of premium, promises to pay the insurance moneys upon satisfactory proof of death, and recites that the application is made a part of the contract. At the foot it gives notice that no person except one of the executive officers is authorized to make, alter, or discharge contracts or waive forfeiture, and on the back it contains a list of privileges to the insured.

A fair and convenient specimen for examination in detail is the policy of the Mutual Benefit Life Insurance Company of New Jersey, the principal clauses of which will require our consideration in this chapter, although it may be premised that the general principles which govern the fire policy are also applicable to the life policy.

§ 171. The Beneficiary.—*Payable to A. B., or to his executors, administrators, or assigns.*

A policy in this form is the property of the assured, is subject to the claims of his creditors, and upon his death is collectible by his executors or administrators like any other personal assets of his estate, unless he has previously assigned the policy;¹ but oftentimes the policy is made payable to other beneficiaries, and frequently they are designated by such indefinite terms that it is not easy to determine to whom the description is intended to be applicable. In such a case the

¹ Bishop v. Grand Lodge, 112 N. Y. 627 (1889).

words are liberally construed, and parol evidence is freely received to arrive at the real meaning of the insured.¹ In the case last cited in which the policy was made payable to the "legal representatives" of the insured, the court refused to allow the proceeds to fall into the general assets of the estate for the benefit of creditors, and held that the insured intended to designate his wife and children. And in another case it was held that the phrase "lawful heirs" was used in a colloquial sense and might include the widow.² In case of a policy to "my wife Mary and children," a child by a former wife is a beneficiary.³ To "be paid to his wife M. K. and children," means to *his* children by this wife or others, not M. K.'s children.⁴ If the policy is payable to wife and children, they all divide the proceeds equally and not in accordance with the statute of distributions.⁵ Children born after the contract are included, unless the children are specifically named.⁶ Any one of those named as beneficiaries may assign his expectant interest, and the assignee will take the right to which he was entitled.⁷ In order to effectuate the apparent intent of the insured, "child" was held to mean an adopted child.⁸ "Children" does not mean "grand-children."⁹ A designation of beneficiaries can be made only in accordance with the charter and by-laws of the company, so far as they may govern the subject.¹⁰ So, also, any change of appointment must conform to the regulations of the company; but here, too, the court will, so far as possible, give effect to the intention of the parties, and will consider an attempted change of beneficiary complete without undue regard to technicalities.¹¹ The change of appointment may be sustained without the issuance of the certificate of insurance.¹² Although the designation of beneficiary may be

¹ *Griswold v. Sawyer*, 125 N. Y. 411.

² *Martin v. Aetna Life Ins. Co.*, 73

³ *Hannigan v. Ingraham*, 55 Hun, Me. 25.

⁴ *McDermott v. Centennial Mut. Life Asso.*, 24 Mo App. 73.

⁵ *U. S. Trust Co. v. Mut. Ben. Life Ins. Co.*, 115 N. Y. 152.

⁶ *Koehler v. Centennial Mut. Life Ins. Co.*, 66 Iowa, 325.

¹⁰ *Sanger v. Rothschild*, 123 N. Y. 577. *Marsh v. Amer. Legion of Honor*, 149 Mass. 515. *Britton v. Royal Arcanum*, 46 N. J. Eq. 102.

⁷ *Jackman v. Nelson*, 147 Mass. 300.

⁸ *Thomas v. Leake*, 67 Texas, 469.

¹¹ *Luhrs v. Luhrs*, 123 N. Y. 367.

⁹ *Conn. Mut. Life Ins. Co. v. Baldwin*, 15 R. I. 106.

¹² *Bishop v. Grand Lodge*, 112 N. Y. 627.

irregular, or may altogether fail, the court will enforce the contract if possible and not allow it to fall.¹ Statutory provisions permitting the insured to make a new appointment are not applicable where the interest of the first-named beneficiary has become vested for value paid.²

§ 172. Application Incorporated.—*In consideration of the statements in the application made a part of this contract, etc.*

This form of words incorporates the representations of the application into the contract and makes them express warranties.³

If the alleged warranty were contained in the application alone, and that were not expressly made a part of the contract, it would simply amount to a representation, inasmuch as the policy would in that case supersede it.

§ 173. Statements as to Health or Freedom from Disease.—Health is a relative term, for probably no one is altogether free from ailments. To violate a warranty of good health it must appear that the sickness was one having a tendency to shorten life or permanently impair the health; in fact, that it amounted to a vice in the constitution.⁴

In answer to the question, "Have you ever had any difficulty with your head or brain?" the applicant said "No;" and the court decided that the question called for a functional or organic derangement, and that periodic headaches though severe did not constitute a ground for forfeiture.⁵

Good health is consistent with a touch of dyspepsia⁶ and with a mere cold.⁷

A congestion or disorder of the liver is not necessarily a disease of the liver within the meaning of the policy; and in

¹ Addison v. New Eng. Comml. N. Y. 292; 36 Am. Rep. 617. Bankers' Travellers' Assoc., 144 Mass. 591. Croft v. Home Ben. Asso., 120 N. Y.

² Smith v. National Ben. Soc., 123 N. Y. 85.

⁵ Higbie v. Guardian Mut. Life Ins. Co., 53 N. Y. 603.

³ Cushman v. U. S. Life Ins. Co., 63 N. Y. 404.

⁶ Morrison v. Wis. Odd Fellows Mut. Life Ins. Co., 59 Wis. 162.

⁴ Peacock v. New York Life Ins. Co., 20 N. Y. 293. Grattan v. Metropolitan Life Ins. Co., 92 N. Y. 274; s. c., 80

⁷ Metrop. Life Ins. Co. v. McTague, 49 N. J. Law, 587.

these and similar cases, if the testimony leaves it in doubt whether the disorder is a slight attack or a permanent or serious disease, the question is for the jury.¹

So in a case of pharyngitis,² gastritis,³ bronchitis,⁴ Bright's disease,⁵ consumption,⁶ gout;⁷ and the jury must determine whether a slight attack of pneumonia or sunstroke is a disease;⁸ but in one case an attack of vertigo was so slight that the court refused to send the issue to the jury.⁹

The fact that the applicant was afflicted with dyspepsia six months or more before the application was signed did not make untrue his statement that he was not subject to dyspepsia at the time of the policy.¹⁰

Where the testimony is undisputed that the applicant was affected with a certain disease or disorder—as, for example, rupture or tonsilitis—his statement to the contrary in the application is a breach of warranty, and it would be error to submit the question to the jury.¹¹

If the warranty is that the assured has not had spitting of blood, and the testimony shows that this statement is not true, there is no question for the jury.¹²

The insured said in her application that she was in sound health. She died of phthisis nine months after the policy was issued, and was sick three years before her death. Held error in refusing to instruct for the company.¹³

The answer "never sick," made by a German unfamiliar with our language, was construed to mean that he had never

¹ *Cushman v. U. S. Life Ins. Co.*, 70 N. Y. 72. *Co., v. Trefz*, 104 U. S. 197. *Moulor v. Ins. Co.*, 101 U. S. 708. Conn.

² *Mutual Ben. Life Ins. Co. v. Wise*, 34 Md. 582. *Mutual Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250.

³ *Price v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 497. ⁹ *Mutual Benefit Life Ins. Co. v. Daviess*, 87 Ky. 541.

⁴ *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381. ¹⁰ *World Mut. Life Ins. Co. v. Schultz*, 73 Ill. 586.

⁵ *Contl. Life Ins. Co. v. Yung*, 113 Ind. 159. ¹¹ *Glutting v. Metropolitan Life*, 50 N. J. L. 287. *Ætna Life Ins. Co. v. France*, 91 U. S. 510. *Pratt v. Dwelling House Mut. Ins. Co.*, 53 Hun, 103.

⁶ *Vose v. Eagle Life & Health Ins. Co.*, 6 Cush. 42. ¹² *Smith v. Ætna Life Ins. Co.*, 49 N. Y. 211.

⁷ *Fowkes v. Manchester & L. Life Ins. Co.*, 3 Fost. & F. 440. ¹³ *Metropolitan Life Ins. Co. v. Boos v. World Mutual Life Ins. Co.*, 64 N. Y. 236. *Knickerbocker Life Ins. Dempsey*, 72 Md. 288.

had any of the list of diseases enumerated in the application.¹

§ 174. Statements as to Medical Attendance.—

If the applicant names a doctor as his attending physician, this may not avoid the policy although the physician is not the usual medical attendant, for the statement may still be true.²

And the question as to the truth of the statement in regard to the medical attendant or usual medical attendant or family physician, if the testimony is in doubt, is for the jury.³

But medical consultation or treatment means for the purpose of procuring or furnishing medical aid, and not necessarily for a specific disease; and giving medicine by a physician to relieve suffering is prescribing medicine within the meaning of an application.⁴

And if on the undisputed testimony the answer is untrue, the court must dismiss the complaint.⁵

In one case the question was, "Name and residence of family physician?" and the answer was, "Refer to Doctor Corning." The proofs showed that Doctor Corning was not the physician of the insured, but the court held that upon this ambiguous form of response it was proper to leave the question of forfeiture to the jury.⁶

The insured stated in the application that he had had no medical attendance within the year. A physician testified that he had attended him and prescribed for him within that time in the presence of certain members of the family, who testified that they had no recollection of it. Held, that the question of breach was for the jury.⁷

§ 175. Statements as to Other Insurance.—Inquiry is sometimes made in the application upon this point, and

¹ Knickerbocker Life Ins. Co. v. Trefz, 104 U. S. 197.

² Cushman v. U. S. Life Ins. Co., 70 N. Y. 72.

³ Gibson v. Amer. Mut. L. Ins. Co., 37 N. Y. 580. O'Hara v. U. B. Mut. Aid Soc., 134 Pa. St., 417. Edington v. Mutual Life Ins. Co., 67 N. Y. 185. Huckman v. Fernie, 3 M. & W. 505.

⁴ Cobb v. Covenant Mutual Benefit Assn., 153 Mass. 176 (1891).

⁵ Phillips v. New York Life, 9 N. Y. Suppl. 839.

⁶ Higgins v. Phoenix Mut. Life Ins. Co., 74 N. Y. 6.

⁷ O'Hara v. United Brethren Mutual Aid Society, 134 Pa. State, 417.

it is a matter of special importance to the company where the character or financial condition of the applicant is suspected. A deceptive or misleading disclosure or concealment upon this subject will be fatal.¹

§ 176. Statements as to Age.—The rate of premium being based upon the age of the insured, it is quite material that the response to this question should be correct.

The policy was held void where the applicant erroneously represented his age to be fifty-nine instead of sixty-four.² And where the true age was thirty-five and the application represented it to be thirty, it was held to be a material variation.³

But this requirement, like all others, may be waived, or the company may be estopped from taking advantage of the mistake.⁴

§ 177. Statements as to Family Relationship.—The untrue statement of the applicant that he was a widower was held to be fatal to a recovery under a policy.⁵

A breach of the warranty that the insured was a single man, when in reality a married man, forfeited the policy, although the risk was not thereby increased.⁶

But the erroneous statement by the applicant that the person named in the policy as beneficiary was a cousin of the applicant, was considered too trivial to vitiate the contract.⁷

§ 178. Habits.—The statement that the applicant is of temperate habits does not mean that he totally abstains from drinking wines or liquors.⁸

¹ London Assurance v. Mansel, 11 Co., 107 N. Y. 292. O'Brien v. Home L. R., Ch. Div. 363. Clapp v. Mass. Ben. Soc., 117 N. Y. 310.

Ben. Assoc., 146 Mass. 519. Edington v. Ætna Life Ins. Co., 77 N. Y. 564 ; White, 100 Pa. State, 12. . s. c., 100 N. Y. 536.

⁶ Jeffries v. Life Ins. Co., 22 Wall.

² Swett v. Citizens' Mut. Relief Society, 78 Me. 541.

⁷ Britton v. Royal Arcanum, 46 N.

³ Ætna Life Ins. Co. v. France, 91 J. Equity, 102.

U. S. 510. ⁸ Van Valkenburgh v. Amer. Popular Life Ins. Co., 70 N. Y. 605.

⁴ Miller v. Phoenix Mut. Life Ins.

A statement of habits is of a fact, and not of an opinion.¹

In any case of doubt, the question of habits must go to the jury.²

And the United States Supreme Court, with what would seem to be an over-indulgence to the insured, expressed the opinion that a man might have the delirium tremens once, without necessarily violating this warranty.³ The English court thought this was too liberal.⁴

§ 179. Statements as to Occupation.—Where the applicant warranted that he was a soda-water maker, and was, in fact, a soda-water seller, it was held to be no breach of warranty.⁵ But the statement being a warranty, it must be in effect true, or the policy will be avoided.⁶

§ 180. Statements or Requirements as to Residence and Travel.—If these are restrictions contained in the policy, they must be complied with;⁷ and if statements in the application, they must be true.

The settled limits of the United States, means within the bounds of the Union, and not the portions of the country that are thickly settled.⁸

If a permit is given to travel by a particular route or to remain in a hazardous region for a particular time, the limitation must be strictly obeyed.⁹ An inability to return will be no excuse.¹⁰ And a subsequent receipt of the money by the company, without knowledge of the forfeiture, will not revive the policy.¹¹

¹ Thomson v. Weems, 9 App. Cas. Co., 80 N. Y. 292; s. c., 36 Am. Rep. 686.

² Meacham v. N. Y. State Mut. Ben. M. Mut. Aid Assoc., 122 N. Y. 247.

Assoc., 120 N. Y. 237. Pelton v. ⁶ Dwight v. Germania Life Ins. Co., Westchester Fire Ins. Co., 77 N. Y. 103 N. Y. 341.

⁶⁰⁵ Ætna Life Ins. Co. v. Davey, ⁷ Nightingale v. State Mut. Life Ins. 123 U. S. 739. Northwestern Life Ins. Co., 5 R. I. 38.

Co. v. Muskegon Bank, 122 U. S. 501. ⁸ Casler v. Conn. Mut. Life Ins. Co., Miller v. Mutual Ben. Ins. Co., 34 22 N. Y. 427.

Iowa, 222. ⁹ Hathaway v. Trenton Mut. L. & F.

³ Insurance Co. v. Foley, 105 U. S. Ins. Co., 11 Cush. 448.

350. ¹⁰ Evans v. U. S. Life Ins. Co., 64

⁴ Thomson v. Weems, 9 App. Cas. N. Y. 304.

686. ¹¹ Bennecke v. Insurance Co., 105

⁵ Grattan v. Metropolitan Life Ins. U. S. 355.

But the company or its representative may waive the requirements of the policy.¹

Where an English policy required notice to the directors, and written consent to visit a foreign country, it was held that notice under the policy to an agent of the company was sufficient, where the agent, for several years afterwards, collected the premiums and remitted them to the company, although he had not express authority to waive the contract conditions.²

§ 181. Statements about Bodily Injuries.—The rule of construction is very similar to that applicable to statements concerning health. A temporary or trivial injury, of which no permanent effects remain, is not a serious personal injury, and what is serious under the testimony of most cases would be made a question for the jury.³

A cut from which a little blood flows, is not a hurt or a wound.⁴

And the omission to recollect a temporary injury to an eye, caused by sand which was thrown into it and inflamed it, was not considered necessarily fatal to the policy where the applicant had answered in the negative the question whether he had ever had any illness, local disease, or injury in any organ.⁵

¹ *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 244.

⁴ *Bancroft v. Home Ben. Assoc.*, 120 N. Y. 14.

² *Wing v. Harvey*, 5 DeG. M. & G. 265.

⁵ *Fitch v. Amer. Popular Life Ins. Co.*, 59 N. Y. 557.

³ *Ins. Co. v. Wilkinson*, 13 Wall. 222.

CHAPTER XVII.

LIFE POLICY—CONTINUED.

§ 182. Payment of Premiums.—*The policy to cease unless premiums paid, when due, at the home office, and upon production of receipts signed by president or treasurer, and policy not to take effect until first premium actually paid.*

The payment of the premium is of the essence of the contract, and, in fact, constitutes all that the company receives under the contract, and a failure to pay on or before the days named will avoid the policy unless the company is in some way responsible for the omission, or waives it.¹ Punctuality in payment is essential.²

So, also, if the premium is paid by a note, and the policy provides for forfeiture upon non-payment of the note, no relief can be granted in case of breach.³

A local agent has no authority, simply by virtue of his position, to receive anything but cash.⁴ But if he is intrusted with the closing of the contract by delivering the policy, according to the better opinion he has an implied authority to decide how the premium then due may be paid.⁵

This authority to waive contract provisions as to the method of paying the first premium does not extend to subsequent premiums, except as the plaintiff can show authority in the agent emanating from the insurers, either express instructions, or a known practice of the agent sanctioned by the company.⁶

¹ Klein v. Ins. Co., 104 U. S. 88. Y. St. Rep. 573. Acey v. Fernie, 7 M. & W. 151.

² Holly v. Metrop. Life Ins. Co., 105 N. Y. 437. ⁵ Critchett v. Am. Ins. Co., 53 Iowa 404; s.c., 36 Am. Rep. 230. Boehen v.

³ Knickerbocker Life Ins. Co. v. Williamsburgh Ins. Co., 35 N. Y. 131. Pendleton, 112 U. S. 696.

⁴ Raub v. N. Y. Life Ins. Co., 14 N. Y. Ins. Co., 101 Mass. 558. ⁶ McAllister v. New Eng. Mut. Life

The president or secretary of the company, however, may waive a forfeiture for non-payment of premium, or give credit, although the terms of the policy forbid it.¹

And the plaintiff is at liberty to show, as matter of fact, if he can, that the company has given the agent sufficient authority to waive this or any condition of the contract.²

If the previous course of dealing between the company and the insured warrants it, payment may be by check instead of cash.³

Where the beneficiaries named in a life policy had no knowledge of the existence of the policy, which had been fraudulently surrendered to the company by the insured before his death, the court decided that there was a valid excuse for the non-payment of premiums.⁴

But, in general, as we have already seen, sickness, paralysis, or other inability to comply with the terms of the contract furnishes no excuse,⁵ but the receipt and retention of the premium at the home office constitutes a waiver of any informality in the method of payment, and also of all known breaches of the policy.⁶

§ 183. Assessments.—In mutual companies the premiums are often paid in the form of assessments, and it is customary on the happening of the loss to call for an assessment with which to meet it. Notice of the time and place of payment is given by the company.⁷

The jury determines whether or not the notice has been received. If not received there is no forfeiture,⁸ unless the policy provides that sending or mailing of the notice is sufficient.⁹

¹ *Dilleber v. Knickerbocker Life Ins. Co.*, 76 N. Y. 567. *Church v. Conn.*, 530.

Lafayette Fire Ins. Co., 66 N. Y. 122. ⁵ *Rice v. New Eng. Mut. Aid So.*, 146 Mass. 248. *McGurk v. Met. Life Ins. Co.*, 56 Conn. 528.

² *Wyman v. Phoenix Mut. Life Ins. Co.*, 119 N. Y. 274. *Van Schaick v. Niagara Fire Ins. Co.*, 68 N. Y. at 139. ⁷ *Covenant Mut. Ben. Assoc. v. Spies*, 114 Ill. 463.

⁸ *McCorkle v. Texas Ben. Assoc.*, 71 Tex. 149. ⁹ *Union Mut. Acc. Assoc. v. Miller*,

⁴ *Whitehead v. N. Y. Life Ins. Co.*, 102 N. Y. 143. 26 Ill. App. 230. *Yoe v. Howard, &c., Ben. Assoc.*, 63 Md. 86.

§ 184. Suicide.—*Exemption of insurers from liability for suicide, sane or insane.*

The insurer is still liable, in spite of this clause, where the death is purely accidental without any intent to commit suicide.¹

Where the insured is named as beneficiary, a criminal act of suicide or a death by hanging would vitiate the contract without any express provision, inasmuch as a contract of insurance presupposes good faith.²

Though a recent writer on life insurance suggests the contrary view.³

But if the interest in the policy is vested in other beneficiaries, and the contract is valid at the time when it was entered into, the guilty act of the insured does not vitiate it to the prejudice of the beneficiaries.⁴

If, however, the insured took out the policy with the guilty intent of committing suicide, the contract would be void *ab initio*.⁵

So, also, if the beneficiaries intentionally compass the death of the insured after the policy is taken out, they can recover nothing upon it.⁶

Frequently in life policies, and almost invariably in accident policies, there is a provision that the company shall not be liable in case the injuries named are self-inflicted, or, as it is often worded, if the insured dies by "suicide," or "by his own hand," or "takes his own life," which have been held to be equivalent forms of expression.⁷

The proper meaning of the suicide clause, where the words "sane or insane" do not form a part of it, has been the subject

¹ Phillips v. La. Equitable Life Ins. Co., 26 La. Ann. 404; s. c., 21 Am. Rep. 549. Equitable Life Assur. Soc. v. Paterson, 41 Ga. 338. Knights of Golden Rule v. Ainsworth, 71 Ala. 436. Lawrence v. Mutual Life Ins. Co., 5 Bradw. (Ill.) 280.

² Knights of Golden Rule v. Ainsworth, 71 Ala. 436. Hartman v. Keystone Ins. Co., 21 Pa. State, 466. Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121.

³ Cooke on Life Ins., Sec. 41.

⁴ Darrow v. Family Fund Society, 116 N. Y. 537; s. c., 15 Am. St. Rep. 430. Fitch v. American Popular Life Ins. Co., 59 N. Y. 557; s. c., 17 Am. Rep. 372.

⁵ Smith v. National Benefit Soc., 123 N. Y. 85.

⁶ Prince of Wales, &c., Assoc. v. Palmer, 25 Beav. 605.

⁷ Accident Ins. Co. v. Crandal, 120 U. S. 527.

of much discussion by the courts, which is traced historically at great length in May on Insurance.¹

Where the exemption from liability is simply death from suicide or other equivalent form of expression, without the words "sane or insane," it has been held that the exception does not avail the insurers as a defence if it appears that the assured was devoid of reason when he took his life. This conclusion is put upon the ground that an act beyond the control of the assured is, in effect, nothing but an accident. As to the degree of insanity which will operate in such a case as an excuse to the insured to prevent the application of the exception, two rules have been laid down. The English, New York, and Massachusetts courts, and others, have adopted the view that to take a case out of the proviso of the policy on the ground of insanity the assured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it under the influence of some uncontrollable insane impulse. These courts hold that it is not sufficient to show that his mind was so impaired that he was not conscious of the *moral obliquity* of the act.²

The United States Supreme Court and others following its authority have, on the contrary, defined the rule as follows: "This court on full consideration of the conflicting authorities upon that subject has repeatedly and uniformly held that such a provision, not containing the words 'sane or insane,' does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act or only such as to prevent him, while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect."³

The distinction between these two rules of law is probably too metaphysical to make it of any practical consequence whether the jury is charged in terms of the one or in terms of the other.

¹ Chapter XV.

Ins. Co., 102 Mass. 227 ; s. c., 3 Am.

² Van Zandt v. Mutual Benefit Life Rep. 451.

Ins. Co., 55 N. Y. 169 ; s. c., 14 Am. ³ Acc. Ins. Co. v. Crandal, 120 U. S. Rep. 215. Borradaile v. Hunter, 5 M. 531. Bigelow v. Berkshire L. Ins. Co., & G. 639. Cooper v. Mass. Mut. Life 93 U. S. 284 ; s. c., 19 Am. R. 628, note.

To secure the benefit of the restriction, which it is hardly necessary to say was really intended to be secured by the earlier forms of expression, the insurers have generally added to the suicide clause the words "sane or insane," and with this addition the exemption covers all cases of intentional self-destruction. The insurers are thus relieved from responsibility, unless the death of the insured was purely accidental.¹

In one case it was held, by a strict construction against the insurers, that the taking of poison through mistake or ignorance would not avoid the policy, although the words of the suicide exception clause were, whether "voluntary or otherwise," instead of "sane or insane"; which forms of expression the court regarded as synonymous.²

If the company sets up the defence of suicide, the burden of proof rests upon it, and if the facts are equally susceptible of either construction, it will be presumed that death was the result of an accident and not of a criminal intent.³

But, on the other hand, every man is presumed to be sane, and the burden of proving insanity is on him who alleges it, and the fact of suicide is not of itself sufficient to establish it.⁴

Missouri has adopted a statute that suicide will not avail as a defense.

§ 185. Exception of Death by the Hands of Justice or in Violation of Law.—This, though similar to the last clause, is considered distinct from it.⁵

In the Cluff case it was held that a forcible taking of property under the ill-founded claim of legal right was not a violation of this clause, which is generally confined to those cases in which the act is known to be a violation of law; and by the better view the clause is further confined to cases of violation of criminal law, in which the violation of law and the

¹ De Gogorza v. Knickerbocker Life Ins. Co., 65 N. Y. 232.

² Penfold v. Universal Life Ins. Co., 85 N. Y. 117; s. c., 39 Am. Rep. 660.

³ Mallory v. Travellers' Ins. Co., 47 N. Y. 52; s. c., 7 Am. Rep. 410.
Travellers' Ins. v. McConkey, 127 U. S. 661.

⁴ Weed v. Mutual Benefit Life Ins. Co., 70 N. Y. 561. McClure v. Mutual Life Ins. Co., 55 N. Y. 651. Meacham v. N. Y. State Mutual Benefit Assn., 120 N. Y. 237.

⁵ Cluff v. Mutual Benefit Life Ins. Co., 13 Allen, 308.

act causing death are a part of one and the same continuous transaction.

Thus where the insured met his death by being shot by a person with whose property he was interfering, it was held that this clause of the policy would not avail the insurer as a defense.¹

But where the insured was killed by a shot fired in provocation caused by an affray that had ended, a judgment in favor of the insurer was sustained on the ground that if the acts of the insured were such as to produce in his slayer a high degree of passion, and while he was in such a state he shot and killed the insured, the death was the natural consequence of the assault.²

Where the insured was engaged in the lawful defense of his person, there being reasonable cause to apprehend a design to do him personal injury, the exemption clause was held to furnish no defense to the insurers.³

But the death was held to be "in the known violation of the law" where the insured died within a few hours from wounds inflicted by the husband of a woman upon whom he was committing assault and battery.⁴

§ 186. Authority of Agents.—*Agents not authorized to make, alter, or discharge this or any other contract in relation to the matter of this insurance, or to waive any forfeiture hereof, or to grant permits, or to receive for cash due for premiums anything but cash.*

The effect of this clause has been discussed under the subject of general principles, in Chapters VII. and VIII.

As was observed in the introductory chapter, there is ordinarily nothing in the usual course of business, as transacted by the local agents of life insurance companies, from which any one dealing with them has the right to infer that they possess any authority to make or unmake a policy, or to alter its terms, except in some instances in regard to the method of

¹ Bradley v. Mutual Benefit Life Ins. Co., 45 N. Y. 422; s. c., 6 Am. Rep. 115.

² Murray v. N. Y. Life Ins. Co., 96 N. Y. 614; s. c., 48 Am. Rep. 658.

³ Overton v. St. Louis Mutual Life Ins. Co., 39 Mo. 122; s. c., 90 Am. Dec. 455.

⁴ Bloom v. Franklin Life Ins. Co., 97 Ind. 478; s. c., 49 Am. Rep. 469.

paying premiums.¹ But, as we have also seen, the agent may, by his conduct in connection with the execution of the written application, estop the company where the misstatement is in reality his act, within the scope of his authority, and without fault on the part of the insured.² Neglecting, however, to read the application without sufficient excuse is fault on the part of the insured.³

§ 187. Errors in Age.—*Any error made in understating the age of the insured will be adjusted by paying such amount as the premiums paid would purchase at the table rate.*

This provision is liberal to the insured, and more reasonable than a stipulation providing for absolute forfeiture in case of an error in stating the age.

This clause illustrates the disposition on the part of insurance companies to make an equitable arrangement with the insured, so far as they can do so without exposing themselves to unscrupulous and fraudulent claims.

§ 188. Assignments.—*No assignment of this policy shall take effect until written notice thereof shall be given to the company.*

This provision, be it observed, does not prohibit an assignment of the policy. It is desirable that the insured should have the opportunity of making free use of this form of property, for it may often be convenient to secure money, by loan or otherwise, upon it. Unlike the case of a fire policy, as we have seen, a life policy was considered assignable at common law. And, by the better opinion, if the policy is valid when taken out, it may be assigned or made payable to one who has no insurable interest; though in the Federal⁴ Supreme Court a different rule has been suggested.

A pledge or deposit of the policy is not of itself an assignment.⁴ Where, with the consent of the insurers, an assignment

¹ Critchett v. American Ins. Co., 53 Iowa, 404; s. c., 36 Am. Rep. 230. Boehen v. Williamsburgh City Ins. Co., 35 N. Y. 131; s. c., 90 Am. Dec. 787.

² Ins. Co. v. Wilkinson, 13 Wall. 222. Miller v. Phenix Mut. Life Ins. Co., 107 N. Y. 292.

³ N. Y. Life Ins. Co. v. Fletcher, 117 U. S. 519. Ryan v. World Life Ins. Co., 41 Conn. 168; s. c., 19 Am. Rep. 490.

⁴ Griffey v. N. Y. Central Ins. Co., 100 N. Y. 417; s. c., 53 Am. Rep. 202.

has been consummated, this amounts to a new contract between the company and the assignee.¹

As to the past, however, the assignee simply steps into the position of the assignor, and can only recover under the policy in case the assignor has not been guilty of any breach.

No one except the company can, in any event, make objection to the assignment from the original insured to the assignee, unless the policy is payable to other beneficiaries, who have a vested interest therein.²

After the death of the insured, the interest in the policy is a chose in action which can be assigned without consent of the insurers, and without regard to the provisions of the policy.³

§ 189. Incontestable.—*This policy, after two years, will be incontestable, except for fraud or non-payment of premium.*

Insurers have been somewhat stimulated, no doubt, by the statutory requirements, which will be found in the appendix, to insert this liberal provision.

¹ *Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush. 337.

² *Leinkauf v. Calman*, 110 N. Y. 50.

³ *Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. 609. *Hall v. Dorchester Mut. Fire Ins. Co.*, 111 Mass. 53; s. c., 15 Am. Rep. 1.

CHAPTER XVIII.

THE ACCIDENT POLICY.

ACCIDENT insurance is a branch of life insurance, and is governed by the same principles. The latter protects against loss by death, whether caused by old age, disease, or accident. The former is limited to loss caused by accident, whether occasioned by a bodily disability or fortuitous death.

§ 190. Accident.—An accidental injury is one that happens to the insured without the concurrence of his will or intent, but it may be the result of his intentional act provided only such result was not foreseen; thus in case of an injury to the insured caused by intentionally jumping from the platform of a train of cars under such excusable circumstances that no harm could have reasonably been expected to follow.¹ So of an injury to the insured caused by a blow from the handle of a pitchfork slipping through his hands while he was loading hay, which produced peritoneal inflammation and ultimately death, the beneficiary was allowed to recover on the ground that the loss was by accident.² So of a sprain caused by lifting heavy weights.³ So of an unintentional draught of poison.⁴

Unless expressly excluded by the terms of the policy, an accident covers an injury intentionally inflicted upon the insured by another; as, for example, in an affray.⁵ But where the terms of the policy expressly exclude an injury of that character, the restriction of the contract will prevail.⁶

¹ U. S. Mutual Accident Assn. v. App. 509 (1890). But see Bayliss v. Barry, 131 U. S. 100. But see Southard Travellers Ins. Co., 6 Ind. L. J. 109. v. Railway Pass. Assur. Co., 34 Conn. Preferred Mut. Acc. Assn. v. Beidelman, 1 Monaghan (Pa.), 481.

² North Am. Ins. Co. v. Burroughs, 69 Pa. St. 43.

³ Martin v. Travellers Ins. Co., 1 F. & F. 505.

⁴ Mut. Acc. Assn. v. Tuggle, 39 Ill.

⁵ Order of Chosen Friends v. Garigus, 104 Ind. 133.

⁶ DeGraw v. National Acc. Society, 51 Hun, 142. Travellers Ins. Co. v.

McConkey, 127 U. S. 661.

Sunstroke, when not expressly excluded from the operation of the policy, is generally considered to be a disease rather than an accident.¹

In regard to negligence of the insured, where the policy is silent, the rule is the same as in other branches of insurance; but, as we shall soon see, the usual conditions of the policy modify the insurer's liability in this respect.² Accidental injury is a phrase of such broad scope that, as might be expected, the insurers have limited its application by many restrictive provisions, differing somewhat in the forms of policies adopted by the different companies.

§ 191. Amount of Recovery and for What Accidents.—*The sum of dollars per week against loss of time not exceeding twenty-six consecutive weeks, resulting from bodily injuries effected through external violent and accidental means which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation above stated, or if loss by severance of one entire hand or foot, etc., or if death results from such injuries alone within ninety days.*

Death by accidental drowning is by external, violent, and accidental means.³ Death during a plunge bath, in the house, was held not to be within the policy.⁴ But where a boat was overturned by the waves and the insured was drowned, the death was covered by the policy.⁵

Where an accident produced a weakened condition of the system, from which cold and pneumonia resulted, it was held that the whole chain of events was caused by the accident as a proximate cause;⁶ and within the same principle of law was classed an accident which caused physical injuries which, in turn, resulted in apoplexy and death;⁷ but where disease is

¹ Sinclair v. Maritime Passengers' Assn. Co., 3 Ellis & El. 478. Dozier v. Fidelity & Casualty Co., 46 Fed. Rep. 446.

² Schneider v. Providential Life Ins. Co., 24 Wis. 28; s. c., 1 Am. Rep. 157.

³ Trew v. R'y Pass. Assur. Co., 6 H. & N. 839. Mallory v. Travelers' Ins. Co., 47 N. Y. 52; s. c., 7 Am. Rep. 410.

⁴ Tennant v. Travellers' Ins. Co., 31 Fed. Rep. 322.

⁵ Tucker v. Mutual Benefit Life Co., 50 Hun, 50; s. c., 121 N. Y. 718.

⁶ Isitt v. Railway Passengers' Assur. Co., L. R. 23 Q. B. Div. 504.

⁷ National Benefit Assn. v. Grauman, 107 Ind. 288.

specially excepted from the chain of causation, the rule is otherwise.¹ So, also, where intentional injuries, inflicted by the insured or any other person, are expressly excepted from the operation of the policy, the wider liability of the insurers must be limited by the terms of the contract.²

The provision that the injury insured against must be effected by the specified means, "independently of all other causes," is so unreasonable, indefinite, and repugnant to the main purpose of the contract, that the courts construe it very strictly against the insurers; and sometimes really seem to disregard it altogether. Thus, though the policy excepted death arising from fits, acting directly or jointly with accidental injury, the insurance was held to cover a case where the insured was seized with a fit and fell under the wheels of an engine which caused his death.³ And in another case, although the policy expressly excepted "injuries from taking poison in any manner," the Illinois court allowed a recovery for death from an overdose of laudanum taken by mistake.⁴

The insured was shot in the back, causing a paralysis which involved the loss of the use of his feet. It was held to be a loss of "two entire feet."⁵ The meaning of total disability is considered in *Young v. Travelers' Ins. Co.*,⁶ and depends very much upon the wording of the particular policy. By a strict construction of the policy against the insurers, the same court allowed a recovery where the immediate cause of death was fright.⁷

§ 192. Exception of Hazardous Employment.—

Whether one occupation is more hazardous than another

¹ *Smith v. Accident Ins. Co.*, 22 L. T. N. S. 861.

² *De Graw v. National Accident Society*, 51 Hun, 142. *Phelan v. Travelers' Ins. Co.*, 38 Mo. App. 640.

³ *Lawrence v. Accidental Ins. Co.*, 7 Q. B. D. 216. *Fitton v. Accidental Death Ins. Co.*, 17 C. B. N. S. 122.

⁴ *Tuggle v. Mut. Acc. Asso.*, 39 Ill. App. 509 (1890). *Contra*, *Hill v. Ins. Co.*, 22 Hun, 187.

⁵ *Sheanon v. Pacific Mutual Life Ins. Co.*, 77 Wis. 618 (1890); s. c., 20 Am. St. Rep. 151.

⁶ 80 Me. 244. See also *Lyon v. Railway Pass. Assur. Co.*, 46 Iowa, 631. *Hooper v. Accidental Death Ins. Co.*, 5 H. & N. 545; s. c., 6 H. & N. 839. *Rhodes v. Railway Pass. Assur. Co.*, 5 Lans. 71.

⁷ *McGlinchey v. Fidelity & Casualty Co.*, 80 Me. 251; s. c., 6 Am. St. Rep. 190.

would be a question for the jury, unless the policy contained its own classification.¹ An employment or occupation does not refer to some unusual and incidental act, which a person may chance to be engaged in temporarily, but to his regular and usual occupation or calling in life.²

§ 193. Injuries excluded of Which there is no Visible Mark on the Body, the Body Itself in Case of Death not being Deemed such Mark.—The courts are not inclined to pay very much respect to the provisions of the policy which purport to control the laws of evidence, and the question of proof of accidental injury in case of any disputed material fact must go to the jury. They will decide the fact upon the evidence before them, without much regard to any rule of evidence that may be specified in the contract.³ Under the requirement that the evidence of injury must be direct and positive, the character of the injury itself may furnish sufficient evidence where there is no presumption that the injury was intentionally inflicted.⁴

§ 194. Poison, etc.—*Voluntary or involuntary taking of poison or contact with poisonous substances or inhaling of any gas or vapor.*

This exception covers the accidental taking of poison.⁵

The courts have construed this clause very strictly against the insurers, and in a recent case it was even held that "breathing gas" involuntarily was not the "inhaling of gas," though the distinction seems to be a very fine one.⁶ In another case it was held that the word "poison" did not apply to death from

¹ Eggenberger v. Guarantee Mutual Accident Assoc., 41 Fed. Rep. 172. Am. Rep. 410. Paul v. Travelers' Ins. Co., 112 N. Y. 472; s. c., 8 Am. St. Rep. 758.

Tucker v. Mutual Benefit Life Co., 50 Hun, 50. Knapp v. Preferred Mutual Accident Assoc., 53 Hun, 84. 'Travellers' Ins. Co. v. McConkey, 127 U. S. 661. Utter v. Travelers'

² Stone v. U. S. Casualty Co., 34 N. J. L. 371. Ins. Co., 65 Mich. 545; s. c., 8 Am. St. Rep. 913.

³ Peck v. Equitable Accident Assn., 52 Hun, 255. Cited with approval, in O'Brien v. Home Ben. Society, 117 N. Y. 319. Reynolds v. Equitable Acc. Assoc., 59 Hun, 15. Mallory v. Travelers' Ins. Co., 47 N. Y. 52; s. c., 7 Cole v. Accident Ins. Co., 61 L. T. N. S. 227 (1889). *Contra*, Mut. Acc. Assoc. v. Tuggle, 39 Ill. App. 509 (1890).

⁴ Paul v. Travelers' Ins. Co., 112 N. Y. 472; s. c., 8 Am. St. Rep. 758.

a malignant pustule resulting from the touch of an abraded part of the lips with a putrid animal substance, but that the word was confined to the internal reception of a poisonous substance. It was, however, held, that the pustule in question amounted to a disease, and so brought the case within another exception in favor of the company.¹

§ 195. Exception of Injuries Resulting from Violating Law.—The meaning of this clause was considered under the subject of the life policy. The exemption was construed in a recent case where it was held that an accident from slipping upon frozen ground while returning from hunting on Sunday, in violation of law, was not covered by the policy, and the insurer was discharged.²

§ 196. Exception of Injuries Happening from Voluntary Exposure to Unnecessary Danger.—This provision modifies the rule which would otherwise prevail, that the negligence of the person insured constitutes no defense to the insurers.

This exception as specified in the policy is applicable to a death where the insured is struck by a railroad train while walking on the track.³

But another court was of the opinion that it was not applicable to a death where the insured stepped from the train through a hole in the floor of a bridge, where the train temporarily stopped, the existence of which hole he had no reason to suspect.⁴

Where the exemption was worded to except injuries from "exposure to obvious risk," the English court gave the following rule: "Two classes of accidents are excluded from the risks insured against; viz., (1) accidents which arise from an exposure by the insured to risk of injury, which risk is obvious to him at

¹ *Bacon v. U. S. Mut. Accident Assn.*, 123 N. Y. 304; s. c., 20 Am. St. Rep. 748.

² *Duran v. Standard Life and Accident Ins. Co.*, 20 Ins. L. J. 1035 (Vt. Apl. 14, 1891).

³ *Tuttle v. Travellers' Ins. Co.*, 134

Mass. 175; s. c., 45 Am. Rep. 316. *Cornish v. Accident Co.*, L. R., 23 Q. B. D. 453.

⁴ *Burkhard v. Travellers' Ins. Co.*, 102 Pa. State, 262; s. c., 48 Am. Rep. 205. *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13; s. c., 46 Am. Rep. 618.

the time he exposes himself to it; (2) accidents which arise from an exposure by the insured to risk of injury, which risk would be obvious to him at the time, if he were paying reasonable attention to what he was doing."¹

This question will oftentimes be one of fact for the jury.²

§ 197. Entering or Trying to Enter or Leave a Moving Conveyance Using Steam as a Motive Power, etc.—This provision is similar in principle to the last, and aims to limit liability to those cases where the assured has been fairly prudent.³

§ 198. Requirement that the Insured shall Use all Due Diligence for Personal Safety and Protection.—The burden will be upon the insurer to show that due diligence was not exercised.⁴ If the insured is killed by falling from the second story of a barn which he is having built, in consequence of the breaking of a joist, this does not conclusively show a breach of the stipulation; but the question of due diligence is properly left to the jury.⁵

§ 199. Insurance against Injuries received while Traveling.—Some policies are confined to an insurance against loss while traveling by public or private conveyances. Under this restriction the assured was allowed to recover for an injury received by a fall on a sidewalk while walking from a steamboat landing to a railway station, this walk being usual for travelers on that route, although he might have ridden in a hack;⁶ but, generally speaking, walking could not be held to be a "traveling by public or private conveyance."⁷

¹ Cornish v. Accident Ins. Co., L. R. 23 Q. B. D. 453 (1889).

⁴ Freeman v. Travelers' Ins. Co., 144 Mass. 572.

² Shaffer v. Travelers' Ins. Co., 31 Ill. App. 112. Mair v. Railway Passengers' Assur. Co., 37 L. T. N. S. 356.

⁵ Stone v. U. S. Casualty Co., 34 N. J. Law, 371.

³ Miller v. Travelers' Ins. Co., 39 Minn. 548. Hull v. Equitable Accident Assn., 41 Minn. 231. Bon v. Railway Passengers Assur. Co., 56 Iowa, 664; s. c., 41 Am. Rep. 127.

⁶ Northrup v. Railway Passenger Assur. Co., 43 N. Y. 516; s. c., 3 Am. Rep. 724. Theobald v. Railway Passengers' Assur. Co., 10 Ex. 45.

⁷ Ripley v. Ins. Co., 16 Wall. 336.

CHAPTER XIX.

THE MARINE POLICY.¹

THE purpose of marine insurance, as was pointed out in Chapter I., is to enable the merchant or ship-owner to carry on his ventures undisturbed by that element of uncertainty which is brought in by the dangers of navigation. Another element of uncertainty, that arising from the fluctuation of the market, the merchant or ship-owner retains for himself.

The combination of these two uncertainties is affected by a third; namely, the ordinary variation in the length of a voyage, which may arise either from accident or without accident, inasmuch as one vessel may be a quicker sailer than another, or may meet with better winds or fewer calms, or may be more skillfully or more fortunately navigated. A delay arising from such causes may occasion loss or gain as the market chances to go up or down. If there be a gain, this must not belong to the underwriter. The underwriter, therefore, cannot be asked to pay for the loss. The chances of a longer or a shorter voyage, as affecting the market, must remain with the assured.

Again, it is of the essence of insurance that it shall be on both sides a fair speculation. The underwriter must have a chance of gaining to counterbalance his risk of loss. It follows that the losses he has to pay for must be such as *may*, not such as *must*, happen.² This excludes ordinary wear and tear for damage necessarily suffered in driving the ship through the water by sail or steam, and this notwithstanding the degree of such damage may vary with the variations of the weather, and the winds, and other incidents common to all voyages; it likewise excludes loss arising from natural wastage, corruption

¹ In the following discussion of the Marine Insurance by MacArthur and clauses of the policy I have drawn Lowndes.

heavily upon the practical treatises on ² Paterson v. Harris, 1 B. & S. 353.

through lapse of time, heating from the confined atmosphere of the hold, and other causes inevitable under the given conditions. These are matters which a merchant can with more or less accuracy estimate beforehand, and they must be taken into account in determining the market price of his ventures; or, at all events, the underwriter does not make himself responsible for them. For the same reason, an underwriter must in no case be liable for losses caused by the bad faith or misconduct of the assured himself, since such a liability would destroy the fairness of the speculation.

The marine policy, a specimen of which is given in the appendix, is found upon examination to contain three distinct stipulations. The first and principal is the promise on the part of the insurers that they will take upon themselves certain specified perils or causes of loss which may come to the hurt or detriment of the thing insured, which is specified, for a voyage or for a term which is likewise specified. A second stipulation is what is called the "sue and labor" clause, which is an encouragement to the assured to use exertion in the saving of his property when in peril, by a promise to contribute to the expenses he may thereby incur; and, third, the modern addition known as the memorandum clause, which sets a limit to these two promises by exempting the insurer except in events therein named from claims below a certain percentage or from claims for damage to certain kinds of goods which are regarded as exceptionally hazardous.

The promise of the insurers is given to a person named or described; it is given whether the thing insured is at the time lost or not lost; it has relation to a subject matter or thing which must be specified; this thing at risk is the ship, or in the ship, and under the command of a master; it is for a voyage or term marked out, together with the precise point of place or time at which the voyage or term commences and terminates; the amount of liability may be left open, or it may be fixed by an agreed valuation; and, lastly, the promise is a guarantee against loss from certain specified perils subject to certain conditions or warranties.

§ 200. Name of the Assured.—All persons except alien enemies, that is, subjects of a foreign state at war with

the home country, have the right to protect their property by insurance. The name of the insured should be inserted after the words "on account of."

The reason for the exception of alien enemies is that it is considered impolitic on public grounds to permit subjects to make good the losses sustained by an enemy's commerce. It is therefore an understood condition of insurances upon foreign property that they do not cover any loss which may happen while hostilities are being carried on between the respective countries of the assured and the underwriter.¹

§ 201. Lost or not Lost.—The effect of this stipulation is that the insurer takes upon himself not only the risk of future loss but also loss, if any, that may have already happened. The necessity for such a retrospective application in policies is evident; for, owing to the time occupied in the transmission of advices from abroad or other unavoidable causes, property is often exposed to marine risks before the parties interested are cognizant of the fact or have had an opportunity to protect themselves by insurance.

If the assured is aware of the loss at the time when the insurance is effected he cannot recover from the underwriter who undertook the risk in ignorance of the fact; nor is it permissible for an underwriter to retain the premium if at the time of such insurance he is privately informed of the ship's arrival.² But if at the time when the insurance is effected the vessel has arrived in safety, the underwriters will be entitled to the premium, provided they and the assured were alike ignorant of the fact.³

Where a policy of insurance has been effected by one party on behalf of another without authority, it may be ratified after loss by the party on whose behalf it is made though the latter be informed of the loss at the time of such ratification.⁴

§ 202. At and From.—These words precede the blank for the description of the voyage. There is a material differ-

¹ *Ex parte Lee*, 13 Vas. Jr. 64. *Bradford v. Symondson*, 4 Asp. Mar. Sands v. N. Y. Life Ins. Co., 50 N. Y. L. C. 455.

626; s. c., 10 Am. Rep. 535.

⁴ *Williams v. North China Ins. Co.*,

² *Carter v. Boehm*, 3 Burr, 1909.

L. R. 1 C. P. D. 757.

³ *People v. Dimick*, 107 N. Y. 13.

ence between insurance "from," and one "at and from," any place. The first form of description attaches to the vessel on sailing, but the second covers, also, the risk in port.¹

When a vessel is insured "at and from" a home port where she is then lying, the risk commences as soon as the insurance is effected, and continues during the whole time she remains there in preparation for the voyage insured.

When a vessel is insured "at and from" a port abroad to which she is bound, the policy attaches on the arrival of the vessel within the limits of such port, provided she is then in a state which will admit of a fair inception of the risk insured.

If the vessel arrive at the port where risk is to have its inception in such a crippled condition that she is unable to lie there in safety until made fit for the homeward voyage, the policy will not attach.²

But, on the other hand, if the vessel, though damaged, be in a condition consistent with her security in port, the risk will commence from the first moment of her arrival within the port specified.³

It is generally the case that on a vessel's arrival at the port where the homeward insurance attaches she is under the protection of an outward policy, which, by its terms, continues in force for a period varying from twenty-four hours to thirty days after her arrival. During this interval, therefore, both policies are in force, and the vessel is doubly insured. To prevent the outward and homeward insurances thus overlapping, a stipulation is often inserted in the latter policies, when an insurance is effected "at and from" an island, or other district comprising several places of trade, that the risk commences on the ship as soon as the vessel has arrived in good safety at any port within such district, and on cargo upon its shipment.

§ 203. The Voyage.—The voyage must be described in such a manner that a mercantile man conversant with the usages of trade ought to be able clearly to understand what is intended, and the voyage thus described must be rigidly adhered to, except in the case of unforeseen necessity.

¹ *Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 453.

² *Houghton v. Empire Marine Ins. Co.*, L. R., 1 Ex. 206.

³ *Parmeter v. Cousins*, 2 Camp. 235.

From first to last there must be no unreasonable delay or divergence from the usual mode of conducting the adventure, otherwise the policy will be void from the moment of committing the deviation, though not antecedently.¹

There are three ways of describing a voyage: Either every port which the ship is to visit may be named, or general words may be used which cover a certain range, and leave room for variations within it; or, lastly, where there is a clear known custom as to the track, and that custom is intended to be followed, it may suffice to name the termini only, and rely on the custom.

If the insurance is from or to a district comprising several ports, these ports must be visited in their natural or geographical order, unless there is an established custom of the trade to vary this order, in which case the customary order must be observed.² But a clause is often inserted in the policy giving permission to touch and stay at certain ports without prejudice to the insurance.

Whether liberty to call at a port gives liberty to land or load cargo there, must depend on whether such an intention may naturally be inferred from the description of the voyage in the policy taken in conjunction with the customs of the particular trade;³ and wherever a ship has liberty to call at a place, she may always land or load goods there, provided this can be done without additional delay.⁴

Sometimes a deviation clause is inserted, providing that the property is covered in the event of a deviation, at a premium to be agreed upon.

§ 204. The Subject of Insurance.—*Upon the body, tackle, apparel, and other furniture of the good ship, or upon all kinds of lawful goods and merchandise laden or to be laden on board the good ship, or upon the freight of all kinds of lawful goods and merchandises laden or to be laden, etc.*

This phraseology covers the descriptions of ship, cargo, and freight in the three classes of American policies, respectively.

¹ *Burgess v. Equitable Marine Ins. Co.*, 126 Mass. 70; s. c., 30 Am. Rep. 654.

² *Urquhart v. Barnard*, 1 Taunt.

⁴ *Raine v. Bell*, 9 East. 195.

³ *Beatson v. Haworth*, 6 T. R. 533.

Lloyd's English policy covers ship and cargo in one general form, which is filled in to suit the particular case.

This general description in the printed form is controlled by the written description of the particular interest which it is intended to insure.

The terms of the description in the policy of insurance upon ship are evidently not to be confined to the body or hull of the vessel, but extend to her materials and outfit; and it has been decided that the provisions of the crew are included under the word "furniture." A policy on "ship" in the ordinary form will cover hull, materials, machinery, boilers, coal, and engine stores; in the case of a steamer, the provisions for the crew and all the appurtenances necessary, suitable, or usual, or that may be presumed to belong to a vessel of such description for the purposes of navigation on a voyage such as that described.

The scope of an insurance on the ship is limited by the usage of the trade to such an outfit as is necessary to make the vessel seaworthy for the voyage insured, to the exclusion of that further portion which may be supplied to fit her for a particular trade.

Thus, in the case of a vessel engaged in the Greenland trade, it was held that the fishing tackle and stores, such as harpoons, lances, etc., for catching whales and seals, as well as the casks, cisterns, etc., for receiving the oil and blubber, were not covered by a general policy on ship, as it was the custom to insure such articles in express terms.¹

But permanent passenger fittings are allowed as appertaining to the ship where the vessel is regularly employed in the passenger trade; permanent cattle fittings, where she is in the cattle trade; a permanent grain ceiling, where she is in the grain trade, etc. Temporary fittings or ballast, such as is supplied for the voyage only, dunnage, provisions for the passengers, and provender for live stock are excluded. "Goods" or "merchandise" denotes whatever is carried on board ship for purposes of traffic.

Here, again, the usage of trade enters to restrict the full meaning of the term, by excluding therefrom, in the absence of established custom, goods laden on deck, and also live stock with the provender for their maintenance, master's clothes, and

¹ Hoskins v. Pickersgill, 3 Dougl. 222.

the ship's provisions. Money or jewels, if carried to trade with, are insurable under the name of goods.

In insuring freight it matters little whether the interest is described as freight, freight per charter party, or the like. Freight must be either a ship owner's profit from carrying goods of his own, or the price of working for others under a contract. The former kind is recoverable under the ordinary policy on freight.¹ As to the latter, the actual contract must necessarily in case of loss be referred to, in order to ascertain what was insured. Speaking generally, a policy on freight must be taken to cover all the ordinary stipulations of the contract of affreightment, whether bill of lading or charter party. Where the interest consists of a ship owner's profit by carrying his own goods, though this, as has been said, may with perfect propriety be insured separately as freight, yet generally speaking the method most advantageous to the owner is to insure it in the same policy as the goods, and to value both together, describing them as goods including freight.

It is usual to insure passage money under a distinct name, since the incidents of this risk are in many respects different from that of the freight or merchandise.²

§ 205. Master's Name.—Provision is made in the policy for the insertion of the master's name, partly as a means of distinguishing the ship insured from others of the same name, and partly because the personal character and professional reputation of the captain are not infrequently taken into account by the underwriters in their estimation of the risk. But in practice the blank left for that purpose is often left unfilled.

In immediate sequence to this blank are the words, "or whoever else shall go for master in the said vessel, etc." In case the person originally mentioned to the underwriter as the master of the vessel is prevented from going in her, and another is substituted for him, the insurance is not vitiated, even though the original name may have been inserted in the policy, and may never have been altered, provided the assured has acted throughout in good faith. Again, if the master resign his command, or become incapacitated during the voyage

¹ *Flint v. Flemyng*, 1 Barn. & Ad. 45. ² *Denoon v. Home & C. Assur. Co.*, L. R., 7 C. P. 341.

through sickness and another is appointed in his place, the validity of the insurance is not compromised by the change.

A mistake in the ship's name, however innocently made, will vitiate the policy if it materially mislead the underwriter as to the character of the risk, but otherwise not.¹

Sometimes, especially in insuring consignments from abroad, the ship is not named, the goods being insured per ship or ships. The usual course in such cases is to "declare" the interest by an indorsement on the policy as soon as the ship they are to come by is known.²

Declarations made on the policy are always subject to rectification in case it shall subsequently appear that the advices have come forward, and that the declarations in fact have therefore been made in an order different from that of the actual shipment of the goods. The shipments declare themselves, so to speak, and take rank under the policy in the order in which they occur; so that the declaration written on the policy is merely provisional, and must be set right in case of need.³

§ 206. Commencement of the Risk.—*Beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof, etc.*

Goods are not insured under the general form of policy until they are loaded aboard the ship. If, therefore, the merchant desires to cover the risk in boats or lighters from the shore to the ship, he should insert the clause, "to include all risk of craft whilst loading."

If property in the goods does not pass to the insured until a certain point in the process of shipment, the policy will not attach until that point is reached; as, for example, where, by the terms of a contract for the purchase of a cargo of rice, no interest in the rice passed to the buyers until the shipment of the cargo was completed, it was held that the latter had no insurable interest in the cargo while in course of shipment.⁴ If it is to cover goods shipped at some place other

¹ *Ionides v. Pacific F. & M. Ins. Co.*, L. R., 6 Q. B. 674.

³ *Stephens v. Australasian Ins. Co.*, L. R., 8 C. P. 18.

² *Snowden v. Guion*, 101 N. Y. 458.

⁴ *Anderson v. Morice*, 3 Asp. Mar. L. C. 291.

than the port of departure, that intention ought clearly to appear by the terms used.

§ 207. Termination of the Risk.—*Until the ship hath moored anchor twenty-four hours in good safety, until the goods and merchandises shall be safely landed.*

Between the termini designated the policy protects the goods during the whole time, not on ship-board merely, but while they are in the warehouse at an intermediate port, always supposing that they are put there legitimately, as from some enforced necessity, or because a landing and transshipment falls within the regular course of the voyage insured.¹ The ship continues protected at port before the voyage is completed, during all time properly taken in discharging cargo, effecting needful repairs, or otherwise making ready for the voyage.² The policy likewise covers all delay occasioned by accidental causes during these operations, such as being frozen in for the winter, or the like.³

It is important to understand clearly what is meant by mooring in good safety, after which the ship is no longer covered by the policy.⁴ In the first place, these words presuppose the arrival of the vessel at the terminal point of the voyage, which is, in the case of a cargo-laden ship, the usual place of discharge;⁵ and, secondly, they provide that she shall have been securely anchored at that spot for the period described.

The term "good safety" does not mean absolute immunity from danger, for that would be a condition impossible of attainment at any stage of a marine adventure, but such a measure of security as will suffice to enable the vessel to discharge her cargo and accomplish the other ordinary purposes of a stay in port. Two kinds of security are included in the term "good safety;" namely, physical and political safety. Good physical safety means not the safety of the moorings, but of the ship; not absolute freedom from damage, for then the loss of a rope or sail or spar would prevent the vessel from being considered in safety: but, on the other hand, she must not be in a sink-

¹ Harrison v. Ellis, 7 E. & B. 465.

⁴ Leeds v. Mechanics Ins. Co., 8 N.

² Phillips v. Irving, 7 M. & G. 328. Y. 351.

³ Brown v. St. Nich. Ins. Co., 61 N. Y. 332.

⁵ Samuel v. Royal Exchange Assur. Co., 8 B. & C. 119.

ing condition, as was the case with a vessel which arrived at her port of destination a complete wreck, and after being kept afloat for a few days, lashed to a hulk, sank in the harbor.¹ Good political safety means immunity from capture or arrest; thus a British vessel, which the day after her arrival at a French port was laid under an embargo then existing against all British ships, was held to have never moored at anchor twenty-four hours in good safety.²

A cargo-laden ship must be moored at her usual place of discharge before the twenty-four hours will commence to run, and accordingly in the case of a vessel which arrived at her moorings in the Thames, but the same day was ordered into quarantine, and was subsequently destroyed by fire before obtaining her release, it was held that the policy was still running at the time of loss because the vessel had not been moored at anchor twenty-four hours in good safety.³

Though it is necessary that a vessel should have arrived at her place of discharge, it is not necessary that the discharge should have actually commenced; for if the vessel has arrived at her moorings and remained there the specified period, awaiting her turn to unload, the risk is off. Policies on outward bound vessels are sometimes so framed as to continue in force for thirty days after arrival at port of destination.⁴

With regard to time policies, the precise date of commencement and termination is named in the policy. The day, unless otherwise expressed, begins and ends at midnight.

The risk on cargo continues until the goods have been deposited upon the wharf or their customary place of discharge. It then ceases, for the underwriter is not liable for loss arising from theft, fire, or any other perils to which the goods may be subjected while lying on the wharf or in dock, unless an express clause to that effect has been inserted in the policy. In order that the policy may continue to protect the goods while in course of landing, they must be taken from the ship to the shore in the mode which is usual in the trade at the port where the discharge takes place. If it is customary in the trade to convey goods from the ship to the shore in lighters, launches,

¹ *Shawe v. Felton*, 2 East, 109.

³ *Waples v. Eames*, 2 Str. 1243.

² *Minett v. Anderson, Peake's R.*
211.

⁴ *Lidgett v. Secretan*, L. R., 5 C. P.
190.

or other small craft, they are protected by the policy during such transport.¹ If, however, the assured depart from the usual course of trade by taking charge of the goods at an earlier period than they would have been delivered to him under ordinary circumstances, the underwriters will be discharged from responsibility.²

The policy only covers goods while they are at the risk of the assured; and consequently, if cargo be sold afloat, without an assignment of the policy, and the buyers take delivery of the cargo in lighters sent alongside, the risk of lighterage from ship to shore will not be covered, as the underwriters' risk would, under such circumstances, cease on delivery.³

Cargo should be landed within a reasonable time after the ship's arrival; otherwise it will cease to be covered by the policy. What is a reasonable time in any particular case depends upon the usages of the trade.

When goods are insured by vessel bound to several ports in succession, the risk ends at the final port of discharge named in the policy. But the insurance may be prolonged by the addition of the words "the risk to continue until arrival of the goods at a market at their final port of discharge."⁴

The underwriters' risk upon the bill of lading freight may be considered coincident with the risk on goods, since it does not commence until the cargo is shipped, and then only applies to such portion of it as may be actually on board, unless cargo has been contracted for under a valid agreement, and is lying in readiness to be placed on board, the ship also being ready to receive it. The termination of the risk on cargo and freight respectively is in general simultaneous. For concurrently with the landing of the goods in safety the ship-owner earns the freight upon them, and the risk of the underwriter on freight is proportionately reduced; so that, in the event of the ship being lost after a part of her cargo has been discharged, the loss on the freight policy will be limited to the freight on the cargo remaining on board. In the case of chartered freight, however—that is, money payable for hire of a ship under a

¹ *Matthie v. Potts*, 3 Bos. & P. Archangel M. Ins. Co., L. R., 10 Q. B. 23.

² *Sparrow v. Caruthers*, 2 Str. 1236.

⁴ *Richardson v. London Assurance*

³ *North of England P. O. C. Co. v. Co.*, 4 Camp. 94.

charter party—the risk commences as soon as there is an inception of performance under the charter party (*i. e.*, when the owner or hirer has incurred expenses and taken steps toward earning freight) irrespective of the question whether any cargo has been placed on board or is in readiness to be so placed, and continues until the vessel has performed her contract. But the words “from the loading thereof” in a freight policy exclude the goods not actually loaded, and also the freight for them.¹

§ 208. Touch and Stay.—*And it shall be lawful for said vessel in her voyage to proceed and sail to, touch and stay at, any ports or places if thereunto obliged by stress of weather, etc., without prejudice to this insurance.*

The words “if obliged by stress of weather, etc.,” practically nullify the important privilege which would otherwise be extended to the insured by this clause. If such a privilege is given to touch and stay at any ports or at certain ports named; it is understood in the case of a voyage policy that the ports visited must lie within the ordinary track of the voyage, and that they must be visited for some purpose connected with the object of the adventure.²

Where steamers or sailing vessels of a particular line or in a particular trade habitually follow a specific route or call at certain ports, the usage so to do will be tacitly incorporated in a policy in the ordinary form without the addition of any special clause.

¹ Jones v. Neptune Marine Ins. Co., Bragg v. Anderson, 4 Taunt. 229. L. R., 7 Q. B. 702. Williams v. Shee, 3 Camp. 469.

² Lavabre v. Wilson, 1 Dougl. 284.

CHAPTER XX.

MARINE POLICY—CONCLUDED.

§ 209. **Perils of the Seas.**—These denote all marine casualties resulting from the unusual or violent action of the elements as distinguished from their natural and silent influence upon the fabric of the vessel. But they do not, as has been already observed, include the deterioration of a vessel's hull and materials, commonly called wear and tear, which is incidental to her employment in navigation and her exposure to the ordinary action of the elements; nor do they include injuries to the machinery incident to its ordinary operation.¹

Vessels cannot be navigated without encountering the action of wind and wave, and are often liable to be on the ground or to come into contact with piers without the happening of anything abnormal. At the same time, it is to be remembered that any ordinary occurrence will become extraordinary if qualified by unusual conditions, but there must be something fortuitous to constitute a peril of the sea.

Thus a transport in government service was ordered into Boulogne, where there is a dry harbor, and was moored near one of the quays. The vessel took the ground on the ebb of the tide, as was inevitable; but, owing to the presence of a considerable swell in the harbor, she struck the ground with unusual violence, and subsequently eighteen of her knees were found to be broken. The court held that this damage was the result of a peril of the sea.²

In another case, the ship, which was insured under a time policy, proceeded in the course of her trading to Sunderland, where she was moored head and stern, and took the ground in the usual way at the ebb of the tide. The beach was hard and

¹ Thames & Mersey Marine Ins. Co. v. Hamilton, L. R., 12 App. Cas. 484. ² Fletcher v. Inglis, 2 B. & Ald. 315.

steep, and the ship lay with a slight list toward it. She appeared to strain in this position, especially when taking the ground and floating, and after remaining some time in the place it was found that she was hogged. The Court of Common Pleas held that the damage received under the above circumstances was not caused by perils of the seas, but fell within the designation of wear and tear. Here the vessel on her arrival at Sunderland went up the river, and, in consequence of the rising and falling of the tide, rested upon the river's bed and received damage. There was nothing fortuitous, no peril, no accident.¹ Where live cattle carried between decks were thrown violently together and killed by the tremendous rolling of the sea, though not touched by the water, this was held to be a loss "directly by the sea."²

Sails split by the wind or blown away while set, unless occasioned by the ship's grounding or coming into collision, or in consequence of damage to the spars to which the sails are bent, are not, according to the general practice, chargeable to underwriters, although the weather may have been stormy at the time of the occurrence.

This custom is to be supported rather on grounds of expediency than of principle. A sail which is blown away in a hurricane is as truly lost by the operation of sea perils as a mast which is carried overboard by the same cause. On the other hand, if the splitting or carrying away of sails in use were to be allowable whenever they were subjected to an extraordinary strain, there would be much practical difficulty in the endeavor to discriminate between ordinary and extraordinary weather, especially in view of the fact that the resistance which a sail is capable of offering to the wind depends to a considerable extent upon its quality and condition.

There is a similar rule of practice relative to rigging, which is, that rigging injured by straining or chafing is not charged to underwriters, unless such injury is caused by blows of the sea, grounding, or contact, or by displacement through sea perils of the spars, channels, bulwarks, or rails.

§ 210. Foundering at Sea.—Foundering at sea is included among the perils of the sea if caused by the violence

¹ *Magnus v. Buttmer*, 11 C. B. 876. ² *Snowden v. Guion*, 101 N. Y. 458.

of the winds or waves or any other accidental occurrence, but not so if caused by overloading, defect, or inherent weakness.

If a ship has not been heard of for so long a time after sailing that there remains no reasonable hope of her safety, she is presumed to have foundered at sea. There is neither in this country nor in England any fixed rule as to when that presumption arises. In England, after an interval of time supposed to be sufficient to cover the reasonable chances of arrival, the ship is posted at Lloyd's as missing, and then the underwriters are expected to pay.

§ 211. Grounding.—Grounding, whether arising from stress of weather, ignorance of the locality, blunder or stupidity, the desire to avoid some approaching vessel or other danger, in short, for any reason out of the ordinary course of things in the voyage, is considered one of the perils of the sea.

§ 212. Collision.—Collision is also a peril, and this whether it be the result of inevitable accident or fault on the part of the ship insured, or of fault on the part of the other ship; for, on the principle of *causa proxima*, the underwriter must pay, be the fault whose it may. What he pays for is the damage to the thing he has insured. As for the liability of the owner of the ship in fault to pay for the damage suffered by the other, that is a matter with which his underwriter has, under the body of his policy, nothing at all to do. It is usual however, to provide for this liability by a distinct contract called the collision clause, a specimen of which will be found in the appendix.¹

The principle of the collision clause is that the underwriters will relieve the insured of three-fourths of his liability to pay damages for loss of property in and on board the other ship. He is to take one-fourth himself, as a check upon carelessness in the choice of servants; and his responsibility in respect of loss of life and personal injury, as well as for damage to the cargo in his own ship, is left untouched.

There is a difference to the insured in the language of different collision clauses in respect to the matter of costs, a pro-

¹ *London Steamship, &c., Ins. Co. v. Grampian S. Co.*, L. R., 24 Q. B. D. 663 (1890).

vision for which is sometimes omitted from the clause, in which case the underwriters are not responsible for their share of costs. The liability under the collision clause is not particular average; consequently is not subject to the limitation of five per cent.

§ 213. Stress of Weather.—Under the head of sea perils is damage suffered through stress of weather; as by blows of the seas which carry away bulwarks, boats, deck houses, and the like; by losing masts and yards in a gale; springing of a leak through violent straining; shifting of the cargo, or becoming water-logged. The only difficulty in such cases consists in distinguishing between sea peril and wear and tear.

§ 214. Fire.—Fire may arise from a variety of causes—from lightning, the spontaneous combustion of the cargo, the negligence of the master or crew, the acts of enemies, or the precautionary measures of rulers (as in case of a vessel burned by the municipal authorities for fear of being infected).

The underwriter is liable for loss occasioned by fire, whether its origin is inexplicable or whether it can be assigned to one of the above-named or some other kindred cause, with the exception of combustion generated through the inherent defect of the subject insured, or in consequence of the goods having been shipped in a damaged state. But if the combustion is originated by sea damage sustained by the goods after shipment, it is covered by the policy; and however the fire may have been occasioned, if it extend to other goods which are unconnected with the cause of the disaster, or to the ship herself, the underwriter is responsible.¹

Damage to cargo caused by pouring water into the hold, scuttling the ship, or taking other extraordinary measures to extinguish a fire, is recoverable in general average;² or it may be claimed direct in the first instance under the policy if the latter include the risk of particular average.

If, however, a package is on fire, and water is poured upon

¹ Arnould, Mar. Ins. 760.

² Whitecross Wire & Iron Co. v. Savill, L. R., 8 Q. B. D. 653.

it to extinguish the fire, no allowance is made in general average for any damage by water to the package so affected, but the loss is particular average. The reason for this exception in practice appears to be, that an article which is ignited is deemed to be virtually lost, so that the action of pouring water upon it involves no sacrifice, but is intended to reduce the loss or effect a salvage.¹

The risk of fire is covered during the whole of the transit of goods, on shore as well as on shipboard, provided the transit is for one entire or unbroken voyage, as with insurance on goods it almost always is.

It was held in one case that an explosion of steam caused by the bursting of a marine boiler, though not identical with fire, is a peril of a sufficiently like kind to be covered by the clause comprehending "all other perils, losses, and misfortunes."² But that case was subsequently criticised by the House of Lords and substantially overruled.³

§ 215. Perils of War.—The common feature in this list of perils is violence at the hands of man. The underwriter takes upon himself the burden of all loss or damage thus occasioned, whether it consist of injury to the vessel's hull, spars, and rigging, by an enemy's shot or shell, or by other hostile acts, or the total destruction of the property insured by the operation of the same causes. As, however, merchant vessels are not, in general, able to offer a successful resistance to the attack of an armed ship, the casualty which most frequently results from hostilities is capture.

Capture, in the proper signification of the term, is the forcible appropriation of property by an enemy or belligerent with intent to keep it;⁴ and also covers all losses directly occasioned by capture or seizure, whether legal or illegal, by mutinous passengers or slaves, regularly commissioned vessels of war, privateers, or pirates, with the single exception of capture of Americans' property by American ships in time of war.

¹ Arnould Mar. Ins., 722.

³ Thames & Mersey Marine Ins. Co.

² West India & P. Tel. Co. v. Home, v. Hamilton, L. R., 12 App. Cas. 484 &c., Marine Ins. Co., 4 Asp. Mar. L. C. (1887).

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⁴ Cory v. Burr, 8 App. Cas. 405.

The words "men-of-war" and "enemies" obviously refer to those who, authorized by a prince or sovereign state, make war in the mode sanctioned by the law of nations as distinguished from "pirates," "rovers," and "thieves," who are unauthorized depredators.

"Letters of mart" are commissions granted by the sovereign power to those persons whose property has been seized by subjects of other states, authorizing the former to indemnify themselves for the loss sustained by making reprisals. "Letters of countermart" are letters issued in favor of those threatened by such reprisals, authorizing them to resist the privateers furnished with letters of mart.

Captured property is not considered to have been divested from its original owner until it has undergone sentence of condemnation in a legally constituted court of the enemy. But the assured may abandon to the underwriter, and claim for a total loss, on first hearing of the capture. If the abandonment is accepted by the underwriter, the matter is settled. If it is declined, the assured may take legal proceedings, and will recover, provided the property is not restored before action is brought.

Necessary expenses incurred in the redemption or recovery of captured property are, in general, recoverable under the policy.

The word "thieves," as used in the English policy, has been held to be applicable only to persons proceeding from outside of the ship, not to the crew or passengers. The robbery contemplated, according to that rule, is that which is committed with violence, and does not extend to mere theft which it is considered might be prevented by the exercise of ordinary vigilance on the part of those in charge of the vessel. Consequently the master or owner is alone responsible for this species of loss, which is not attributable to accident, but to the negligence of those who were bound to take proper care of the property. The same interpretation has been given by the English court to the word "thieves" in the bill of lading as in the policy of insurance.¹

A different rule, however, has been followed in America, and the word "thieves" as used in the marine policy here is

¹ Taylor v. Liverpool & G. W. Steam Co., 2 Asp. Mar. L. C. 277.

not confined to assailing thieves, but extends to thefts by mariners, passengers, or others.¹

§ 216. **Arrests, Restraints, etc.**—This clause refers only to acts of state, or acts authorized by the sovereign authority in the country. An unauthorized seizure or detention, as by a mob in a meal riot, does not come within the clause, though the underwriter would be liable for it as a loss by pirates or thieves.² Capture is taking possession with intent to change the property; arrest is taking with intent ultimately to restore to the owner; restraint is a prevention of the goods from going.

The species of arrest to which shipping has been most frequently subject is an embargo, which is a decree issued by the government of a state to prohibit the departure of vessels lying within its jurisdiction. An embargo laid upon any vessel entitles the assured to give notice of abandonment, and, if the embargo continues to the time action is brought, to recover as for a total loss; unless, in the first place, the arrest is only temporary, without occasioning any permanent loss of control over the ship, or unless the assured is a foreigner and the embargo is imposed by his own government in contemplation of hostilities with this country.

The acts and restraints of princes and rulers mentioned in the policy and bill of lading have reference to a forcible interference, and do not extend to legal proceedings conducted in a constitutional manner.³ A blockade operates as a restraint of princes with respect to property detained within its compass; but, according to an English decision, exclusion from a port is not restraint, and, accordingly, a loss resulting from the abandonment of the voyage owing to the blockade of the port of destination was not recoverable under the policy, such a loss being excluded by the rule *causa proxima non remota spectatur*.⁴

The term "people" is to be understood not in the sense of

¹ *Am. Ins. Co. v. Bryan*, 1 Hill, 25. *W. Steamship Co.*, 23 L. T. N. S. Spinetti v. Atlas Steamship Co., 80 251.
N. Y. 71.

² *Nesbitt v. Lushington*, 4 T. R. N. S. 845. See *Richardson v. Maine* F. & M. Ins. Co., 6 Mass. 102; s. c., 783.

³ *Finlay v. The Liverpool & G.* 4 Am. Dec. 92.

⁴ *Rodocanochi v. Elliott*, 28 L. T.

a mob or multitude, but as the ruling power, however it may be composed.¹

Sometimes vessels are seized and detained, and even confiscated, by the authorities under whose jurisdiction they are lying in consequence of some violation of the law having been committed by the persons connected with them. This, however, is not an arrest, restraint, or detainment of princes, though it may amount to barratry of the master or mariners.

§ 217. Barratry of the Masters and Mariners.—

This term signifies any wilful misconduct, either fraudulent or in violation of the law, which is committed by the captain or crew without the connivance of the ship-owner, and which tends to the ship-owner's prejudice, either as injuring or exposing to risk of injury his property or the property intrusted to his care, or as exposing it to the risk of forfeiture or seizure for penalties on account of the breach of law.

Barratry is a crime, and therefore no mere error of judgment can amount to it;² but a willfully improper stowage of cargo on deck, instead of under deck as instructed, will constitute barratry by a master.³ The act of barratry need not be intended for the private benefit of the master or mariners, for any unauthorized breach of law exposing the owner to penalties is barratry, though it were intended for the advantage of the owner;⁴ but negligence is not barratry.

Examples of fraudulent barratry are scuttling, burning, or stranding, or selling or disposing of a ship, or running away with her,⁵ embezzling the cargo and unlawfully selling it, or making away with the proceeds, or any mischief done to ship or cargo by mutineers.⁶ Examples of barratry through mere illegality are smuggling,⁷ illegal trading,⁸ breach of port regula-

¹ *Simpson v. Charleston F. & M. Ins. Co.*, *Dudley* (S. C.), 239.

Dederer v. Delaware Ins. Co., 2 Wash. C. C. 61.

² *Parkhurst v. Gloucester Mut. Fishing Ins. Co.*, 100 Mass. 301; s. c., 97 Am. Dec. 100. *Patapsco Ins. Co. v. Coulter*, 3 Peters, 232.

⁵ *Falkner v. Ritchie*, 2 M. & S. 290. *Lawton v. Sun Mut. Ins. Co.*, 2 Cush. 500.

⁶ *Elton v. Brogden*, 2 Str. 1264.

³ *Atkinson v. Great West. Ins. Co.*, 65 N. Y. 531, overruling s. c., 4 Daly, 1.

⁷ *Havelock v. Hancill*, 3 T. R. 277.

⁴ *Grill v. General Iron Screw Colliery Co.*, L. R. 3 C. P. 476. See

⁸ *Earle v. Rowcroft*, 8 East, 126. See *Carrington v. Merchants' Ins. Co.*, 8 Pet. 495.

tions, exposing the ship to seizure or penalties,¹ and the like. But it should be clearly understood that complicity of the owner in any of these misdemeanors will exclude them from the category of barratry and discharge the underwriter from all responsibility for the consequences.

Complicity may be inferred from a want of reasonable vigilance, as where a captain had gone on smuggling for three successive voyages without interference on the part of the owner.² By the owner must here be understood that owner who has the immediate control over the master and crew ; that is to say, the power of dismissing them. A ship-owner who is also part owner can commit barratry as against his co-owners and their underwriters, though, of course, not against the underwriters of his own share.³ If the policy contains a warranty against capture and seizure, and the barratry is smuggling, and the loss claimed is a penalty inflicted as the price of releasing a ship after seizure, this is not recoverable, being a loss by seizure and therefore barred by the warranty.⁴

The liability of underwriters for the consequences of the barratrous acts of the master and crew may be limited by express agreement.

§ 218. Jettison.—This is the intentional throwing overboard of a part of the cargo, or any article on board of a ship, or the cutting or casting away of masts, spars, rigging, sails, or other furniture, for the purpose of lightening or relieving the ship in case of necessity or emergency. For such losses, the underwriter of the goods jettisoned is in the first instance directly liable ;⁵ the loss, though by the hands of man, being necessitated or justified by the accidents of navigation.

When goods or effects are jettisoned for the common safety, all who have derived benefit, that is to say, the owners of the ship and the entire cargo, are bound to join in replacing the loss by the contribution called general average. If the underwriter of the article thus sacrificed has paid his assured the

¹ Knight v. Cambridge, referred to in 8 East, 136. Wilson v. General Mut. Ins. Co., 12 Cush. 360 ; s. c., 59 Am. Dec. 188.

² Pipon v. Cope, 1 Camp. 434.

⁴ Cory v. Burr, 8 Q. B. D. 313.

³ Jones v. Nicholson, 10 Ex. 28.

⁵ Dickenson v. Jardine, L. R., 3 C.

Contra, where part owner is master, P. 639.

loss, he is entitled to stand in the place of the assured, and to receive his share of the indemnity furnished by the general contribution. When goods are jettisoned, the freight is, so to speak, jettisoned with them, and is likewise recoverable in general average. Loss, which is the necessary and immediate consequence of a jettison, is reimbursed in the same way as the jettison itself. Such, for example, is damage caused by the entrance of water into the ship's hold while a jettison is being effected; or by holes being cut in the deck for the same purpose.

By general mercantile usage, the loss by jettison of goods stowed on deck is not allowed in general average. To this usage there is, however, the well-recognized exception, that, in case the carriage of a deck load is customary in the particular trade, contribution is made for the value of goods jettisoned from the deck in the absence of any agreement to the contrary.

A jettison may be induced by motives other than the common safety, as, for instance, where the ship, being in imminent danger of capture, the master dropped a bag of specie into the sea lest it should fall into the hands of the enemy, for which the underwriter was held liable under the head of jettison;¹ but when goods are thrown overboard on account of their inherent vice, the underwriters are not liable.²

§ 219. All Other Perils, Losses, or Misfortunes.—

The terms of this clause are so comprehensive as at first sight to convey the impression that they embrace every kind of mishap, not already enumerated, to which property at sea can be subjected. Such, however, is not the case; for here the rule of construction applies that general terms following particular ones apply only to matters which are of the same kind with those specified. Accordingly, the effect of the general undertaking, expressed as above, is to bring within the scope of the contract all casualties which, though not identical with, are similar to, the risks enumerated. Thus, the expression of "all other perils, losses, and misfortunes" has been held to include damage to a ship which had been heeled over by the

¹ *Butler v. Wildman*, 3 B. & Ald. 398.

² *Taylor v. Dunbar*, L. R., 4 C. P. 206.

wind in a graving dock; the loss of dollars thrown overboard from a vessel on the point of capture, in order that they might not be taken possession of by the enemy; the wrecking of a steamer through the bursting of the boiler, etc., if from the unusual action of the sea.¹

Damage directly done by rats, as, for instance, by the gnawing of holes in the ship's bottom, whereby she was rendered unfit for sea, has been decided not to be a peril insured against.² If, however, a rat should gnaw through a leaden pipe, and thereby let in water which sinks the ship, the underwriter would no doubt be liable.³ If a sword-fish drives its snout through a plank, the underwriter must pay for the damage.

Damage done by worms to the planking or timbers of wooden ships can be effectually prevented only by copper or metal sheathing. If, through accident, such as a grounding, the sheathing is anywhere rubbed off and worms get in through the unprotected part, such damage must be borne by the underwriters; not so, if a ship unprotected by metal sheathing is sent into seas infested by worms.⁴ Loss or damage by explosion, whether of gunpowder, acids, or chemicals, is recoverable under the policy. So is damage done to one kind of goods as the effect of sea damage done to another kind.⁵

§ 220. Proximate Cause.—Where there is no question of personal misconduct on the part of the assured the law has regard only to the proximate or immediate cause of the loss. But in case of fraud or personal misconduct by the assured himself, all consequences thereof, remote as well as direct, are to be excluded from the claim on the policy.

It is a settled rule of law that any loss directly caused by a peril insured against is to be paid for by the insurers, notwithstanding that the loss may have been brought about by bad navigation, neglect, or fault of the master or seamen, or, ex-

¹ *West India & P. Tel. Co. v. Home & C. Mar. Ins. Co.*, 4 Asp. Mar. L. C. 341.

² *Laveroni v. Drury*, 8 Ex. 166.

³ *Rohl v. Parr*, 1 Esp. 444.

⁴ *Hunter v. Potts*, 4 Camp. 203. See *Garrigues v. Coxe*, 1 Binn. 592; s. c., 71.

⁵ *Koebel v. Saunders*, 17 C. B. N. S.

2 Am. Dec. 493.

cepting only the misconduct of the assured himself, any other cause not directly insured against.¹

Thus, where a ship was destroyed by fire because a careless mate had lighted a fire in the cabin and then left the ship without a watchman on board.² Where a ship fell over on her side in harbor and was bilged because the rope provided to secure her was not strong enough to hold her.³ Where the sloop drifted on the rocks while the seamen in charge of her had all negligently fallen asleep.⁴ Where a ship is damaged by collision, though the collision may have occurred in calm, clear weather, through similar want of lookout, or the mistake of a helmsman.⁵ In these and similar cases the insurers have been held liable on the ground that the peril insured against is the proximate cause.

The question of proximate cause presents itself under different aspects, and a brief statement of some of them will make the subject clearer. Sometimes the starting point is a casualty negligently caused—for instance, a fire—and the inquiry is directed to one of two points, as the case may be: (1) How far shall the spread of the fire be considered a proximate result of the negligence, or (2) shall the loss by fire be said to include consequences like theft, or injury by water used to put out the fire, or loss of business and profits, which, though quite distinct from combustion, are caused by it? Then, again, in another class of cases the starting point is a given damage to the subject of an insurance where different causes have conjoined to produce it, for one of which the insurers are liable and for the other of which they have assumed no express responsibility. The vital question then arises, which cause shall be considered the efficient controlling cause of the loss, and upon the solution of this question turns the liability or exemption of the insurers, as, for example, where a ship is wrecked upon a rock by a storm, but the master was careless in steering it.⁶

¹ Orient Ins. Co. v. Adams, 123 U. S. 67 (1887). Phoenix Ins. Co. v. B. & Ald. 73. American Ins. Co. v. Bryan, 26 Wend. 563.

Erie & W. Tr. Co., 117 U. S. 312. ² Bishop v. Pentland, 7 B. & C. 219.

The Titania, 19 Fed. Rep. 101. ³ Walker v. Maitland, 5 B. & Ald. 171.

Mathews v. Howard Ins. Co., 11 N. Y. 14. ⁴ Smith v. Scott, 4 Taunt. 126.

Dudgeon v. Pembroke, L. R., 2 App. ⁵ Dudgeon v. Pembroke, L. R., 9

Cas. 297. Q. B. D. 581. Thompson v. Hopper,

⁶ Busk v. Royal Exchange Ass. Co., 6 E. & B. 191.

§ 221. A Peril Excepted and Sea Peril.—When a policy is effected with express exemption from some particular peril, as, for instance, with the clause, “free from all consequences of hostilities,” if a loss arises from the joint operation of the peril insured and the peril thus excluded, we are to inquire which of the two was the proximate cause.

This appears from the following decision: During the American civil war the light on Cape Hatteras was extinguished by the Confederate troops for military reasons. Owing to the absence of this light the captain of a ship missed his reckoning, struck on a reef of rocks, and the ship became a wreck. The cargo consisted of 6,500 bags of coffee, of which 1,020 would have been saved if the salvors had not been prevented by the Confederate troops, who themselves only succeeded in saving 170 bags, which they kept for their own use. This coffee was insured “free from all consequences of hostilities.” On these facts the English Court of Common Pleas held that the underwriters were liable for the loss of all but 1,020 bags. The case was to be dealt with, the court said, as if there were two policies, one on the war risk and the other on the sea risk, and the question here was which of the two was the proximate cause of the loss. As to the 1,020 bags, it was the Confederate forces which directly prevented the saving, and so caused the loss of that portion. But the extinguishing of the light was only the remote cause of the loss of the remainder, the proximate cause being the striking on the reef, which could not be said to follow as a natural or ordinary, still less as a necessary consequence of the extinguishing of the light.¹ Where the policy contained an exemption in the form of an ice clause, and the delay and consequent loss were occasioned partly by the ice and partly by a peril insured against, a recovery was allowed on the ground that the peril was the proximate cause.²

§ 222. Proximate Cause as Limiting Insurers' Liability.—The rule looking only to the proximate cause of loss sometimes operates in favor of the insured, but sometimes in favor of the insurers. From this principle it follows that a number of accidental or secondary losses springing out of the

¹ *Ionides v. Universal Marine Ins. Co.*, 14 C. B. N. S. 259.

² *Brown v. St. Nicholas Ins. Co.*, 61 N. Y. 332, by Dwight, C.

damage to the thing insured, and falling on the owner of it, cannot be recovered from the insurer.

For example, when a ship is damaged by sea peril the insurer is liable for the cost of repairing but not for the ship-owner's loss because the ship is laid up and unable to earn freight while being repaired. Nor, again, supposing that during that period it is necessary to retain the ship's crew, or any portion of them, is he liable for the owner's loss in having to pay and feed them while the ship is so unemployed.¹ These losses result not from the damage but from the delay incidental to the damage, so that the damage suffered by the ship, it may be argued, is only the remote cause of them. So if fruit, meat, or any other article of like perishable nature putrefies by reason of delay springing out of sea peril, the insurer is not liable.² Nor, except under the special provision of the collision clause, is the insurer of a ship liable in case the assured is obliged to pay damages to the owner of some other ship on account of a collision occasioned by the fault of his crew.

§ 223. Wear and Tear.—Wear and tear is distinguished from sea peril in not being occasioned by unusual violence or any accident, but by the mere “silent, natural, gradual action of the elements upon the vessel itself.” The chief seat of wear and tear is naturally that portion of the fabric which is directly used in urging the vessel through the water—the sails, rigging, and lighter spars of a sailing vessel, and the screw-shaft of a steamer. Wear and tear must be discriminated from sea-damage, not so much by the kind of weather it occurs in as by the kind of damage done; what is ordinary weather for one season or voyage being storm for another. Besides that, the language of ship-masters varies greatly in intensity of epithet as descriptive of weather.

To distinguish what is wear and tear in particular cases must, to a great extent, be left to the trained judgment of experts in such matters. Some general rules for their guidance, however, are adopted in the practice of adjusters, which may be brought under the following heads: Sails split or blown away while set are ordinarily treated as wear and tear;

¹ *DeVaux v. Salvador*, 4 Ad. & Ell. 420.

² *Taylor v. Dunbar*, L. R., 4 C. P. 206.

but not so, if set when the ship is aground, or if lost in connection with spars carried away, or if blown adrift when furled, or in the act of furling or setting them; and a further exception ought probably to be made in the case of sails split when the ship is lying to, or scudding before the wind, or when she broaches to. The ground of this rule is, that the mere pressure of the wind upon the sails while the ship is under canvas subjects them to an ordinary continuous strain, the effects of which are every now and then shown by their splitting or giving way.

Where rigging is chafed, or stays or running gear parted, from no assignable cause beyond the continuous strain upon them, it is for the same reason treated as wear and tear; but not so, if the cause of the breakage or chafing is something unusual and accidental, such as the carrying away of a mast, or the like. The same rule, with the same exception, is applicable to light spars, as studding sail booms, royal and topgallant yards, and the like. What, for this purpose, are light spars, must be left to the judgment of experts. It seems hardly reasonable that the same rule should serve for small coasters, or yachts, which frequently lose their little spars by carrying on sail, and ships of the largest class, whose topgallant masts may be bigger than the others' topmast, or even mainmast. Spars carried away when no sail is set on them are always admissible as particular average.

The breaking of a screw shaft, through mere wear and tear, is perhaps one of the most ordinary dangers of steam navigation. It is supposed that by the constant revolution of the shaft some process of crystallization is set up, which by degrees renders the iron brittle, so that it may snap under the mere ordinary strain in fine weather; and this takes place at periods so varying in different cases that it is hardly practicable to guard against it. Such a breakage, where there is no accident or violence to account for it, can, of course, be treated only as wear and tear. But there is a good deal of floating wreckage in the sea, and cases do occur in which the breakage of a shaft is not improbably attributable to contact with some such thing.

A ship's ground-tackle, windlass, and hawsers used for mooring, are of necessity subjected to much constant ordinary

strain, or wear and tear. For this reason, the rule of practice formerly was to treat the breakage of a hawser, or parting of a chain cable, or breaking down of a windlass, as mere wear and tear, unless it could in some way be traced to an accident out of the common course, such as the falling of another ship athwart the hawser, so as to bring a double strain upon it, or the like. Latterly, there has been a tendency to relax this strictness, particularly with regard to chain cables; a duly tested chain, it is argued, ought not to give way except under some extraordinary strain, so that its giving way is itself a proof, not that the chain was faulty but that the strain was excessive.

As for a ship's calking—if, without being struck by seas, thrown on her beam ends, or meeting with bad weather, a ship on a long voyage gradually becomes leaky, this is a suspicious symptom of wear and tear, as affecting the hull. If, in such a case, it shall appear that the ship has not been calked for a long time, the ship-owner will probably have difficulty in establishing a claim on his insurers. But these are cases as to which it is hardly possible to lay down a rule; the principle is, that, before an underwriter can be made liable for the calking, it must be shown that the leakiness has been occasioned by more than ordinarily bad weather: and ordinarily bad weather is a relative term, varying with the season and kind of voyage; and the application of this principle to individual cases can only be made with the aid of experts.

224. Original Defect.—Underwriters are not liable for any loss which is the immediate result of an original defect in any part of the hull or materials.

For instance, where a chain parts owing to a defective link, the consequent loss of the anchor and chain is not recoverable. Again, there may be an original flaw in the welding of a stern-post, shaft, or other part of the hull or machinery, which, though at first so slight as to be imperceptible, gradually reveals itself and becomes enhanced by the working of the vessel at sea, until it culminates in a breakdown of the part affected. In such a case the cost of making good the injury will not form the subject of a claim under the policy.¹

¹ *Thames & Mersey Marine Ins. Co. v. Hamilton*, L. R., 12 App. Cas. 484.

§ 225. Sea Damage and Ordinary Deterioration, Combined.—When the repair of sea damage is combined with that of ordinary deterioration, it is often a work of considerable nicety for the adjuster to resolve the complications which ensue, and refer each description of damage to its proper head.

Preparatory to the consideration of a few of the cases of mixed damage which most frequently occur, it will be advisable to inquire how far such matters can be dealt with upon general principles. (1) In the first place it is to be remembered, that, where deterioration of any kind exists to such an extent as to make a vessel unseaworthy on sailing, the risk under a voyage policy will not attach. (2) Where the warranty of seaworthiness is not implied, or has been satisfied, the underwriters are liable for all loss or damage proximately caused by the perils insured against; and there is no other condition of the ordinary policy, whether express or implied, which exonerates underwriters from loss or damage by the perils insured against on the ground that the peril only became operative through the weakness of the thing exposed to it. (3) Deterioration by wear and tear is provided for by the deductions for improvement; but when an article is worn out, those deductions are inapplicable, as the article is practically lost by the ordinary deterioration. (4) The liability of the underwriter for the repair or renewal of any part of a ship's hull or materials, lost or damaged by the perils insured against, is unaffected by the presence of ordinary deterioration, excepting where that deterioration is so extensive that it would have involved the condemnation of the subject of it, irrespective of the further injury, in which case there is no liability on the part of the underwriter, as the ship-owner has sustained no loss by the perils insured against.

In applying these principles, we may first take a case where the combined damage was so great as to amount to a constructive total loss of the ship. A ship insured with the clause "allowed to be seaworthy for the voyage" encountered a violent storm, in consequence of which she was much damaged and had to put into a port of refuge. On examination it was found that many of the beams were broken, and many of the bolts and fastenings loosened; and that the vessel being old, and in

many parts decayed, the decayed parts could not be again made use of, as they would not bear rebolting, but would require to be replaced with new timbers. There was, however, no reason to doubt that the decayed parts were strong enough to have enabled the ship safely to perform the voyage, had it not been for the heavy weather encountered. It was estimated that the aggregate cost of the necessary repairs would exceed the value of the vessel when repaired. On an action upon the policy to recover for a constructive total loss, the learned judge who tried the case left it to the jury to say whether the cost of the repairs of the damage arising from the perils insured against would have exceeded the value of the vessel when repaired, directing them, if they were of that opinion, to find for the plaintiffs. The jury returned a verdict for the plaintiffs. A new trial was then moved for, on the ground that the jury should have been directed, in considering the repairs that were necessary, to exclude from the estimate all such repairs as the decayed state of some parts of the ship made necessary; but the court held that there had been no misdirection, adding that, having carefully examined the evidence, they saw no ground to suppose that any repairs had been included in the estimate which were not fairly referable to the perils of the sea.¹ In this case, it is to be observed that the deterioration which the vessel had suffered by wear and tear was, in effect, cast upon the underwriter, as the necessity to make it good arose from the operation of the perils insured against.

§ 226. Application of these Principles to Particular Average.—We have next to consider the application of the foregoing principles to the adjustment of particular average. For the sake of illustration, let it be supposed that a mast has been sprung by a peril of the sea, and has likewise an inherent defect. If that defect existed on the sailing of the vessel to such an extent as to render her unseaworthy, the risk, under a voyage policy, would not attach. On the assumption that the warranty of seaworthiness had been complied with, or was not implied, the underwriters would be liable for the loss sustained by the assured through the springing of the mast by sea perils, though the inherent defect may have con-

¹ Phillips v. Nairne, 4 C. B. 343.

tributed to that result. If, however, the weather were only ordinary, and the mast, which could have resisted the strain exerted upon it in the absence of the defect, were sprung in consequence of the defect, the underwriters would be free from liability.

The extent of the loss sustained by the assured through the springing of the mast by sea perils has next to be ascertained. If the inherent defect were so great as to involve the condemnation of the mast, irrespective of the injury by sea perils, the assured, having sustained no loss by the latter, would have no claim under the policy. If, however, but for the injury by sea perils, the mast would still have been serviceable, the underwriters would be liable for the cost of repairing that injury. Should the injury involve the renewal of the mast, either on account of the spring alone, or because the latter, though it could have been repaired by fishing the mast, had the latter been sound, cannot be so repaired on account of the defect, the underwriters will be liable for the cost of the renewal, less the ordinary deduction for improvement. If, however, the spring occur in one part of the mast, and the defect in another, so that the spring might have been repaired by fishing the mast, but in consideration of that injury, coupled with the defect, it is decided to have a new mast, the liability of the underwriters will be confined to the estimated cost of fishing the old mast, less the usual deduction for improvement, that being the extent of the loss by sea perils.

A similar case occurs where, in the course of repairing injuries caused by sea perils to a ship's bulwarks and stanchions, or upper deck beams, it is necessary to remove several deck-planks; and the latter, owing to the wood being old and frail, cannot be removed without spoiling them, though if there had been no such defect they could have been replaced. In that contingency, if the deck-planks, though defective, would still have been serviceable had it not been for the disturbing effect of the sea perils, the underwriters are liable for the cost of replacing them, less the ordinary deduction for improvement; though they would not be liable if the planks were so defective as to necessitate their renewal, irrespective of the accident.

When injury to iron-work by the perils insured against is

combined with the effects of corrosion, the liability of underwriters for the combination should be tested according to the same method as has been applied to the case of similar injuries to wood-work combined with the effects of decay.

In case of the fracture of a steamer's shaft, or the breaking down of her machinery, in consequence of inherent defect alone, there is no liability on the part of underwriters for the consequent damage; but, if the damage be aggravated owing to the action of sea perils upon the injured parts, the underwriters will be liable for the enhancement. For instance, should a propeller get loose upon the shaft, owing to a defect in the key, the cost of making good that defect would not be recoverable; but should heavy weather ensue, and the violence of the sea acting upon the displaced propeller cause injury to it or to the shaft, the damage so caused would be claimable as particular average. In the event of a shaft being fractured, or a steam-engine breaking down, on account of sea perils combined with inherent defect, the extent of the loss arising from the former cause must be ascertained upon the same principles as have been stated in relation to other repairs.

§ 227. Limitation of the Liability of Underwriters.—The principal losses which are not covered by the terms of the policy, and for which the underwriters are not liable, are arranged, as below, in a summary form under the four heads specified.

1. Loss by deterioration and ordinary outlay in navigation, such as the splitting or carrying away of sails by the wind; the breaking and straining of the rigging while navigating; the parting of hawsers and ground-tackle, unless subjected to an extra strain owing to some accidental occurrence; the rolling away of small spars, such as studding-sail booms or top-gallant and royal yards, with the exception last mentioned; injury to pumps; the breakage of a steamer's shaft, unless attributable to heavy weather, or some other peril insured against; damage to the hull of a vessel through taking the ground in the ordinary course of navigation; slackness of seams, resulting from wear and tear; the wastage of metal sheathing consequent upon use and exposure; damage by rats or worms; decay of wood-work; corrosion of iron-work; and, in general, the ordi-

nary deterioration of a vessel's hull and materials; ordinary leakage and breakage of cargo; and all ordinary charges incurred during the prosecution of the adventure, including wages and victualing of the crew, though enhanced in amount owing to the prolongation of the voyage through sea perils.

2. Loss by the inherent defect of the subject insured, as where fish or meat becomes putrid, rice or flour heated, fruit rotten, wine sour, or hides tainted, not by contact with sea water, but by natural decomposition, even though the latter arise from the prolongation of the voyage by sea perils;¹ disease and natural death of animals; original defects in the hulls or materials of vessels; flaws in the machinery of steamers, etc.

3. Loss remotely caused by the perils insured against. This limitation includes loss of interest on capital embarked at sea, or loss of market on cargo, owing to the protraction of the voyage by bad weather; loss arising from the compulsory abandonment of the voyage consequent upon blockade, hostile occupation, or other deterrent cause; the liability of ship-owners for loss or injury caused to persons or property through the default of their servants; the liability of ship-owners for the charges incurred in the removal of wreck, even though the underwriters have paid a total loss and claimed the salvage; loss by the forced sale of goods at a port of refuge to provide funds for the repair of the ship, or to defray other expenses necessary for the prosecution of the voyage;² the liability of the cargo-owner to make up the deficit in the payment of a bottomry bond, on ship and cargo, arising from the ship and freight being of insufficient value;³ loss by the forced sale of property under admiralty decree to realize the amount of a claim thereon;⁴ loss by a prejudice, or suspicion of damage;⁵ the forfeiture of freight, arising from the exercise of a power of mulct or canceling option by the charterer, etc.⁶

4. Loss directly attributable to the misconduct of the assured or his agent.⁷ The following are instances of this limita-

¹ Taylor v. Dunbar, L. R., 4 C. P. 206.

⁵ Cator v. The Great Western Ins. Co., 2 Asp. Mar. L. C. 90.

² Powell v. Gudgeon, 5 M. & S. 431.

⁶ Inman SS. Co. v. Bischoff, 5 Asp. Mar. L. C. 6. Mercantile SS. Co. v. Tyser, 5 Asp. Mar. L. C. 6, note.

³ Greer v. Poole, 4 Asp. Mar. L. C. 800.

⁴ Thompson v. Reynolds, 7 El. & B. 173.

⁷ Thompson v. Hopper, 6 El. & B. 172, 937.

tion : Loss by unseaworthiness ; loss in the shipping or landing of cargo, directly attributable to the negligence of the ship-owner's servants, or to defect in the ship's tackle ; damage by bad stowage, rats or other vermin ; loss by American capture or hostile arrest for illegality ; loss resulting from the act of a foreign state, of which the assured is a subject, when committed with a hostile intention against this country (the assured being, in such a case, identified in the eye of the law with his government in the proceeding) ; the loss of articles placed in improper or insecure situations, such as water-casks on deck, and hawsers or other ropes lying on deck, unless the vessel is just entering or leaving port. Under the same head may be placed the custom by which an underwriter is exonerated from liability for the loss of cargo laden on deck, unless its carriage there is sanctioned by special agreement in the policy, or by established custom of the trade.

§ 228. The Sue and Labor Clause.—This clause is to be treated as an engagement distinct from the main body of the policy,¹ and therefore not subject to the restrictions contained in the memorandum. The liability under it is not a liability for particular average.² It is distinct from the rest of the policy in this further sense, that, although the underwriter's liability for a loss of the thing insured resulting from a single casualty is restricted to the amount of his subscription, he may be liable beyond that amount for such a loss when coupled with a claim under the sue and labor clause, as when expense is incurred in an unsuccessful attempt to save a ship which nevertheless is totally lost.³

Two conditions are requisite to constitute a claim under the sue and labor clause : the apprehended mischief must be something for which the underwriters would have been liable, and the measure for safety which gives rise to the expense claimed must be the act of the assured himself or of his agent or servant. If, for example, goods are insured "free of capture," it is clear that an expense incurred to prevent a capture could not

¹ *Lohre v. Aitchison*, 2 Q. B. D. 509.

² *Kidston v. Empire Marine Ins. Co.*, L. R., 1 C. P. 535.

³ *Alexandre v. Sun Mutual Ins. Co.*, 51 N. Y. 253. *Lohre v. Aitchison*, 3 Q. B. D. 558. *Provident & S. SS. Co. v. Phoenix Ins. Co.*, 89 N. Y. 563.

be claimed under this clause ; nor, if “ against total loss only,” an expense incurred merely to diminish damage or avert a loss other than total.*

Where salvors pick up a ship derelict at sea, or as volunteers, and bring the property to port in safety, without being in any sense hired by an agent of the assured, the payment for salvage is not a claim under the sue and labor clause. The cost of repairing a damaged ship is not a claim under the sue and labor clause, while the cost of earning freight by a justifiable transshipment is ; because in the latter case there is a worse evil averted, while in the former case there is not.

§ 229. Exemption under Five Per Cent.—*No partial loss or particular average shall in any case be paid unless amounting to five per cent.*

The purpose of this restriction is to relieve the insurers from such small injuries as may very probably be caused by the natural deterioration of perishable articles, and to exempt them from trifling losses often arising more from wear and tear than from perils insured against, and almost certain to occur in any event.

By the English view, successive losses may be added together to make up the required percentage ;² but the Massachusetts court was of the contrary opinion and held otherwise in respect to successive losses happening to the ship.³ For a further consideration of percentage clauses see § 232.

§ 230. Other Assurance.—*If the assured shall have made other assurance prior in date to this policy, this company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured, and this company shall return the premium upon so much of the sum by them assured as they shall be by such prior assurance exonerated from ; and in case of any assurance upon said premises subsequent in date to this policy, this company shall nevertheless be answerable for the full extent of the*

¹ Kidston v. Empire Ins. Co., L. R., 1 C. P. 543. ² Brooks v. Oriental Ins. Co., 7 Pick. 259. Paddock v. Commercial Ins.

³ Blackett v. Royal Exchange Ass. Co., 104 Mass. 521. Co., 2 Cr. & J. 244.

sum by them subscribed without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent assurance had been made.

This is the American rule in marine insurance, and it differs from the rule in fire insurance, and also differs from the English marine rule, under which all policies share proportionately in the interest irrespective of the dates when they were subscribed, unless there is some stipulation to the contrary.¹

This difference in the laws of different countries is inconvenient and leads to confusion when part of an interest happens to be insured in one country and part in another.

It is a general principle of law that fractions of a day are not regarded, but if two or more policies are made on the same day, insuring the same property against the same risks, and the question of priority is material, this priority will be determined by ascertaining at what time on that day the first was made.²

Priority is determined according to the time of effecting the insurance rather than the inception of the risk, and for this purpose the written date of the policy is not conclusive.³

This clause of the policy is only applicable to other or double insurance, which has been already explained.

It is sometimes expressly stipulated that other insurance of the same date as the policy in question shall be deemed simultaneous therewith. If the property is fully covered by the prior insurance, the subsequent insurance does not attach; but it has been held that if the prior for any reason fails during the term of the subsequent insurance, the latter may then attach, but not if it is because the first company becomes insolvent.⁴

If all the policies, or several of them, of different dates do once attach, and the property is diminished below their aggregate amount during their life, the question arises whether the insurance shall abate *pro rata* on all the policies, or first on the latest policies. On principle, the former rule would seem to be

¹ American Ins. Co. v. Griswold, 14 Wend. 399.

³ Lee v. Mass. Ins. Co., 6 Mass. 208.

² Potter v. Marine Ins. Co., 2 Mason 475.

⁴ Kent v. Manufacturers' Ins. Co., 18 Pick 19. Ryder v. Phoenix Ins. Co., 98 Mass. 185.

the more satisfactory, though there is a decision to the contrary.¹

The effect of violating a provision against other insurance has been considered in connection with the clauses of the fire policy.

§ 231. Warranted Free of Capture.—The meaning of the term “warranted free,” when employed to introduce an exception to the underwriters’ liability, is to guarantee that the interest insured shall be free from any of the excepted perils as a cause of loss for which the underwriter is responsible. This kind of warranty means that although the general terms of the policy would have covered the peril, yet considering the special hazard incident to the particular subject, the underwriters, unless they are paid the premium for consenting to take it, do not choose to be liable for the risk.

The words “capture” and “seizure” are not to be understood as having sole reference to the acts of belligerents. It is true that the proper meaning of the word “capture” is, as already stated, a hostile taking with intent to keep; but this signification is extended by the addition of the word “seizure,” the ordinary and natural meaning of which is a forcible taking possession, however effected.²

Thus a ship had got ashore on the west coast of Africa, where she was boarded by natives, who, after plundering the vessel, left her in such a condition that she was abandoned as not worth repairing. In an action for the loss thus caused it was found by the jury that the natives took possession of the ship to plunder the cargo, and not for the purpose of keeping her, but it was held by the court that this seizure, though only temporary, was a seizure within the meaning of the words in the guaranty, and that the underwriters were consequently exonerated.³

The words “capture” and “seizure” occurring in juxtaposition will therefore be understood to include every forcible proceeding, arising out of the perils insured, whereby the assured

¹ *American Ins. Co. v. Griswold*, 14 Wend. 399.

² *Johnston v. Hogg*, 5 Asp. Mar. L. C. 51.

³ *Johnston v. Hogg*, 5 Asp. Mar. L. C. 52.

is deprived of the control or possession of his property, whether such proceeding be permanent or only temporary in effect, and whether it be the act of an enemy, a friendly power mistaking the vessel for an enemy,¹ mutinous passengers,² or a lawful authority, with the exception of piratical seizure, where that exception is made in the policy.³

If the liability of the insurers depends upon the legality of the seizure, this legality must be determined by the government of the country to which the vessel belongs, and the courts of such country must recognize as conclusive the claims of the executive branch of their government in regard to the sovereignty of any island or country and the right of a vessel to be in its waters.⁴

§ 232. The Memorandum Clause.—The exemption of this clause is not applicable to total loss nor to losses calling for general average contribution, for which, in spite of it, the underwriters are liable; nor in Lloyd's form of policy is it applicable in the case of the stranding of a ship.

Average properly signifies a proportionate or equitable distribution.

This word is loosely employed both in law and in the trade of insurance, and care is needed to escape confusion. As here used it means partial loss.⁵ "Free of average unless general or the ship be stranded," has been construed to mean, "Free of average except general, or unless the ship be stranded;" that is, the underwriters, if such is the form of exemption, are free from all average or partial loss on the articles named, if not a general average loss, and they are liable for all partial loss on the articles named in case the ship be stranded, no matter whether the stranding caused the damage or not.⁶

The damage may even have been discovered and repaired before the stranding takes place, but nevertheless the underwriters would be liable. A stranding at any time during the term insured has the effect of a condition, and effaces the

¹ Powell v. Hyde, 5 El. & B. 607.

⁴ Williams v. Suffolk Ins. Co., 13

² Kleinwort v. Shepard, 1 El. & El. Pet. 415.

447.

⁵ Wadsworth v. Pacific Ins. Co., 4

³ Swinnerton v. Columbian Ins. Co., Wend. 33.

37 N. Y. 174; s. c., 93 Am. Dec. 560.

⁶ Burnett v. Kensington, 7 T. R. 210.

remainder of the clause. By average unless general is meant particular average.¹

The term particular average is confined to the deterioration or actual loss of part of the subject insured. Whence it follows that the percentages specified in the memorandum must be similarly confined as regards their composition. Accordingly, neither general average, particular charges, nor the extra charges incurred to substantiate a claim on underwriters are admissible to form part of the amount requisite to constitute a claim for the particular average, which must be composed exclusively of the loss, consisting either in the deterioration or actual destruction of a part of the subject insured by the operation of the perils insured against.²

Expenses incurred to restore goods to their proper state which have arrived at their destination in a sea-damaged condition are admitted to make up the percentage of a claim for particular average, and are payable by the underwriters when, either alone or in conjunction with other partial loss, they amount to the requisite percentage. The earlier cases held that under the restriction of the memorandum clause, the underwriters would not be liable for a total loss unless actual as contrasted with constructive.³ The later cases would seem to point out a contrary rule upon this important point.⁴

Where the exemption in the policy is worded, "free of partial loss," the Massachusetts court is of opinion that the underwriters are liable for a constructive total loss as well as for an actual total loss.⁵

Total physical loss is not necessary, but only total loss of value to the owner, in order to constitute total loss. Consequently, when the exemption clause is worded, "free of particular average only," the underwriters are liable if there has been a justifiable abandonment for a total loss of value, though some of the goods may ultimately be saved and brought into port *in specie*.⁶ Whether the court in the Wallerstein case

¹ Wright v. Williams, 20 Hun, 320. Mayo v. India Mut. Ins. Co., 152 Mass.

² Price v. Ins. Ass., L. R. 22, Q. B. D. 172 (1890).

580 (1889). ⁵ Mayo v. India Mut. Ins. Co., 152

³ Burt v. Brewers & Malts. Ins. Co., Mass. 172 (1890).

⁴ 9 Hun, 333; affirmed but not involving this point in 78 N. Y. 400. ⁶ Wallerstein v. Columbian Ins. Co., 44 N. Y. 204; s. c., 4 Am. Rep. 604.

⁵ Chadsey v. Guion, 97 N. Y. 333. Ins. Co. v. Fogarty, 19 Wall. 640.

considered the loss actually or constructively total is not altogether clear. But the exemption relieves the underwriters, unless there has been either a total or a constructive loss of the entire cargo insured. Hence when the ship sank and was lost, but before the loss a portion of the cargo had been safely delivered, no recovery was permitted against the underwriters.¹ If a ship is afloat, or it is practicable to put her afloat, or if she is in such a condition that she is capable of being repaired at any expense, she cannot be held to be "an actual total loss;" but the underwriters may take possession of her under a rescue clause in such a case, and convert the loss into "an actual total loss."² Under the exemption, "free from average unless general," or liable "for total loss only," the underwriter is not accountable for a partial loss of any one species of goods, except for general average, although separate boxes or packages of such species may be totally lost.³

In order to mitigate the severity of this rule, it is usual to insert what are called "average clauses," the effect of which is to subdivide the subject matter insured, whether ship or cargo, into smaller parcels, so as to give the assured a chance of recovery in case this or that portion be seriously damaged while the bulk is uninjured. For example, with cotton a clause may be inserted, "average payable on every ten bales running landing numbers." This means that if in any parcel of ten bales, as they are entered in the dock landing book, there is a damage above the memorandum restriction, the insured may recover, although the damage on the entire bulk of that species of goods named in the policy would fall below the memorandum percentage of its value.

§ 233. What Constitutes Stranding.—A vessel is stranded within the meaning of the memorandum clause, "free of average unless the ship be stranded," when, in consequence of some unusual or accidental occurrence, she comes in contact with the ground or other obstruction, and remains hard and fast upon it.⁴

In examining the conditions which are necessary to consti-

¹ Chadsey v. Guion, 97 N. Y. 333.

² Chadsey v. Guion, 97 N. Y. 333.

³ Carr v. Security Ins. Co., 109 N. Y. 504.

⁴ McDougle v. Royal Exchange Assurance, 4 Camp. 283.

tute such a stranding, we have first to notice that a literal lying upon the strand is not essential; for whether the ship be cast upon the shore of the sea, the bank of a river, a rock, a heap of stones or rubbish, piles driven into the shore, or the wreck of another vessel, is immaterial, so long as she comes into contact with and remains resting upon some hard substance in the manner about to be described.

Two specific features are necessary in order that a grounding may amount to a stranding within the meaning of the memorandum; first, it is essential to constitute a stranding that the grounding should be accidental²—not one that occurs in the ordinary course of navigation. To determine whether a grounding was ordinary or extraordinary, inquiry must be made as to whether the ship took the ground in the accustomed place and manner, and in a tidal harbor upon the ebb of the tide, or whether she took the ground in an unusual place or manner, owing to the happening of something fortuitous. The circumstance that the damage was or was not sustained by the ship or cargo through taking the ground, is in general immaterial in deciding as to the ordinary or extraordinary character of the grounding.¹ Circumstances of an extraordinary nature occurring in connection with an ordinary grounding will not convert that class of grounding into a stranding, unless they affect the mode in which the vessel takes the ground.

A vessel grounded at Dunkirk merely through the ebbing of the tide, but after she had settled it was found that she had received injury by striking upon some hard substance. The court, while allowing that any damage caused to ship or goods by this accident would be attributable to perils of the seas, held that the ordinary character of the grounding was not removed thereby.²

A different conclusion was arrived at in a case where the mode of taking the ground was affected by an accident. Thus a vessel had grounded in the usual place and manner in a tidal river, but had afterwards, owing to the stretching of a rope, been moved somewhat astern by the force of the wind, so that she came into contact with a heap of rubbish and sustained

¹ *Hearne v. Edmunds*, 1 Brod. & Bing. 388.

² *Kingsford v. Marshall*, 8 Bing. 458.

damage. This was held to be a stranding within the meaning of the memorandum.¹ Where a vessel, which was moored in a tidal harbor, fell over and was stove in on the ebb of the tide because the rope by which she was lashed was of insufficient strength; this was also held to be a stranding.² Where, by a temporary change of circumstances, however caused, the bottom of a river or harbor is in a particular place in a condition different from its ordinary condition, and thereby a vessel intended to take the ground comes in contact with the ground at that place in a different manner from usual, that is a stranding within the memorandum. Accordingly, a vessel was held to have stranded where, in taking the ground in a tidal harbor, instead of resting upon an even keel, she pitched by the head into a hole, which had been caused by the paddles of steamers in leaving the harbor at low tide, and the existence of which had not previously been discovered.³

The second essential feature in the constitution of a stranding is that the grounding must amount to a settling down upon the obstruction, as opposed to a mere "touch and go." A striking of the ship upon the ground, however violent, will not of itself suffice to constitute a stranding, nor will a mere temporary stoppage of the ship's way. In practice it is deemed sufficient to amount to a stranding if a vessel is hard and fast, without reference to the extent of her surface which is in actual contact with the obstruction.

No definite period can be fixed as the time during which a vessel must remain quiescent in order to have stranded. In one case which came before the courts, it appeared that the vessel had struck upon a rock, and after remaining for a minute and a half, had floated off and proceeded upon her voyage. It was held by Lord Ellenborough that this detention was insufficient; for a stranding meant lying on the shore or something analogous to that. If it is merely "touch and go" with the ship, there is no stranding. Every striking must necessarily produce a retarding of the ship's motion. If by the force of the elements she is run aground, and becomes stationary, it is immaterial whether this be on piles, or on the muddy bank of

¹ Wells v. Hopwood, 3 B. & Adol.
20.

² Letchford v. Oldham, L. R., 5 Q.
B. D. 538.

³ Bishop v. Pentland, 7 B. & C. 219.

a river, or on the rocks, or on the seashore. But a mere striking will not do, no matter where that may happen.¹ As a mere striking the ground with a temporary stoppage will not suffice to constitute a stranding, neither will it suffice if the ship be dragged through the mud, or if she pass over a bar bumping at intervals; but if she is forced ashore or driven on a bank, and remains for any time on the ground, that constitutes a stranding without reference to the degree of damage she may thereby sustain. The shortest time which has been allowed by the English courts as sufficient to amount to a stranding, occurred in a case where it appeared that the vessel had struck upon a rock and remained from fifteen to twenty minutes. This was deemed a sufficiently long detention upon the ground to comply with the condition.² Where a vessel is intentionally run ashore, as, for instance, to keep her from sinking, the grounding is equally a stranding as where it is purely accidental.³

The voluntary stranding of a ship in the presence of an extreme peril is not, by the rule prevailing in England, a general average act which calls for general contribution from the other interests; but, as we have already observed, the rule is otherwise in the United States.⁴

§ 234. Cargo on Deck.—*Cargo on deck is not covered by this policy unless specially indorsed hereon; in all cases to be free from loss by wet, breakage, leakage, or exposure.*

The general rule in regard to deck load, and the effect of custom upon it, have been already considered.

Although not entitled to protection by the terms of the policy, the deck load, if benefited by a general average act, must contribute its share together with the other interests.

§ 235. Blockade.—*Warranted not to abandon in the case of blockade, and free from any expense in consequence of capture, seizure, detention, or blockade, but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.*

¹ McDougle v. Royal Exchange Assurance, 4 Camp. 283.

² Baker v. Towry, 1 Stark. 436.

³ Bowring v. Elmslie, 7 T. R. 216.

⁴ Columbian Ins. Co. v. Ashby, 13 Peters, 331. Star of Hope, 9 Wall. 203.

This expressly limits a liability which would otherwise be imposed upon the insurers by the general terms of the body of the policy, as has been already explained in detail.

§ 236. Average Distinguished from Salvage Loss.

—A particular average on goods consists either in a deterioration or total loss of part of the subject insured by the operation of the perils insured against.

It is requisite to distinguish between a particular average and a salvage loss on goods, as some confusion has occurred in the use of these terms. A salvage loss is a total loss diminished by salvage, and takes place, in relation to goods, when there is either an absolute or a constructive total loss of the subject insured, but some remains of the property have been recovered by the assured. In that case the claim upon the underwriters is for the difference between the insured value and the net proceeds; and the latter are computed by deducting from the gross proceeds of the property saved all charges incurred in realizing the salvage. In short, as it has been concisely put by Stevens, the merchant "receives the net proceeds from the person who effects the sales, and the balance from the underwriter."

Where only a part of the subject insured is sold short of its destination, the remainder being delivered there, the claim, though stated in practice after the manner of a salvage loss, is in principle one for particular average, which is proved by the fact that it is excluded by a warranty to be "free from average, unless general."¹ If goods arrive *in specie* at their port of destination sea-damaged and with the marks obliterated, so that they cannot be delivered to their respective owners, there is nevertheless no claim for total loss under such circumstances, for the owners of the goods are tenants in common of the mass, and the claim is to be stated, according to the rules of particular average, as on goods which have arrived at their destination.²

§ 237. Riders.—A variety of forms of policies are in use both in ocean marine and inland marine insurance, and a great

¹ *Ralli v. Janson*, 6 Ell. & B. 422.

² *Spence v. Union Mar. Ins. Co.*, L. R., 3 C. P. 427.

number of special clauses have been framed, and such clauses are often attached in the form of riders, sometimes for the purpose of restraining and sometimes for the purpose of extending the liability of the underwriters for special purposes.

§ 238. Adjustment.—The details of the adjustments of marine losses between the insurers and the insured are frequently a matter of great complication, and for the most part are put into the hands of professional experts called average adjusters. The adjusters make up an account, apportioning the loss according to the respective rights of the different interests. If there are general average losses, these must be included ; but if there has been a general average adjustment in a foreign port between the parties primarily interested in it, to wit, the owners of ship, cargo, and freight respectively, then the results arrived at in that adjustment are taken as conclusive and incorporated into the adjustment between the insurers and the insured. The professional adjuster is supposed to act in a judicial rather than in a partisan capacity, but his adjustment is not binding upon any of the parties unless by special agreement. In practice the adjustment is generally made the basis of an amicable settlement among the different interests, and law-suits are not as common over marine adjustments as in other branches of insurance business. On the arrival of the ship and cargo partially damaged, the master or owner of the ship advertises for bids for repairs. Bids are accepted, the survey of damage is made, and contracts for rebuilding executed. These, with the bills of lading or invoices, the freight manifest, the charter party, the policies of insurance, and any other proofs of loss, furnish the adjuster with the necessary material for making up his account.

After a loss has been adjusted and paid, the policy becomes merged in the adjustment, and the insurers cannot thereafter avail themselves of any defence, which they might have had under the policy as a ground for opening the adjustment ; but for fraud in obtaining the adjustment itself relief can be obtained.¹ This principle is applicable to adjustments in all branches of insurance law.

¹ *Smith v. Glens Falls Ins. Co.*, 62 N. Y. 85.

PART SECOND.

LEADING ILLUSTRATIVE CASES.¹

CHAPTER I.

TWO OF THE EARLIER ENGLISH CASES.

COURT OF KING'S BENCH, 1777.

TYRIE v. FLETCHER.

(Cowp. 666.)

The contract of insurance is an entirety. If the risk does not attach the premium is returnable, but if it attaches at all the premium cannot be apportioned.

THIS was an action on the case, for money had and received to the plaintiff's use, brought by the plaintiff, the insured in a policy of insurance, against the defendant the underwriter, for a return of part of the premium.

The cause was tried before Lord Mansfield, at Guildhall, at the sittings after last Trinity term, when, by consent, a verdict was found for the plaintiff, subject to the opinion of the court upon the question, whether, under the circumstances of the case, a proportionable part ought to be returned or not. If the court should be of opinion that a proportionable part of the premium ought to be returned, then a nonsuit was to be entered.

It now came before the court, upon a rule to show cause why a nonsuit should not be entered; and the cause, as it appeared from the report, was shortly this: The policy of insurance was upon the ship *Isabella*, at and from London to

¹ The chapters of Part Second are illustrative of the corresponding chapters of Part First, and should be read in connection with them.

any port or place where or whatsoever, for twelve months, from 19th of August, 1776, to 19th of August, 1777, both days inclusive, at £9. per cent., warranted free from captures and seizures by the Americans, and the consequences thereof. In all other respects it was in the common form, against all perils of the sea, etc.

The ship sailed from the port of London, and was taken by an American privateer about two months afterward.

LORD MANSFIELD, C. J.—It was very proper to save this case for the opinion of the court, because in all mercantile transactions certainty is of much more consequence than which way the point is decided, and more especially so in the case of policies of insurance; because, if the parties do not choose to contract according to the established rule, they are at liberty between themselves to vary it.

This case is stripped of every authority. There is no case or practice in point; and therefore we must argue from the general principles applicable to all policies of insurance. And, I take it, there are two general rules established applicable to this question. The first is, that *where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned*, because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured; and whatever cause it be owing to, if he does not run the risk, the consideration for which the premium or money was put into his hands fails, and therefore he ought to return it. (2) Another rule is, that *if that risk of the contract of indemnity has once commenced, there shall be no apportionment or return of premium afterward*. For though the premium is estimated, and the risk depends upon the nature and the length of the voyage, yet if it has commenced, though it be only for twenty-four hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returned; and yet it is as easy to apportion for the length of the voyage, as it is for the time. If a ship had been insured to the East Indies agreeably to the terms of the policy in this case, and had been taken, twenty-four hours after the risk was begun, by an American captor,

there is not a color to say that there should have been a return of the premium. So much, then, is clear, and indeed perfectly agreeable to the ground of determination in the case of *Stevenson v. Snow*, 3 Burr. 1237; for in that case the intention of the parties, the nature of the contract and the consequences of it, spoke manifestly *two* insurances and a division between them. The first object of the insurance was from London to Halifax, but if the ship did not depart from Portsmouth with convoy (particularly naming the ship appointed to be convoy), then there was to be no contract from Portsmouth to Halifax. Why, then, the parties have said, "We make a contract from London to Halifax, but on a certain contingency it shall only be a contract from London to Portsmouth." That contingency not happening reduced it, in fact, to a contract from London to Portsmouth only. The whole argument turned upon that distinction. Mr. Yates, who was for the plaintiff, put it strongly upon that head; and all the judges, in delivering their opinion, lay the stress upon the contract comprising two distinct conditions, and considering the voyage as being, in fact, two voyages: and it was the equitable way of considering it; for, though it was at first consolidated by the parties, there was a defeasance afterwards, though not in words. I think Mr. Justice Wilmot put it particularly upon that ground, but it was the opinion of the whole court. There was a usage, also, found by the jury in that case, that it was customary to return a proportionable part of the premium in such-like cases, but they could not say what part. The court rejected this as a usage for the uncertainty; but they argue from it, that there being such a custom plainly showed the general sense of merchants as to the propriety of returning a part of the premium in such cases. And there can be no doubt of the reasonableness of the thing.

There has been an instance put of a policy where the measure is by time, which seems to me to be very strong, and apposite to the present case; and that is an insurance for a man's life for twelve months. There can be no doubt but the risk there is constituted by the measure of time, and depends entirely upon it; for the underwriter would demand double the premium for two years that he would take to insure the same life for one year only. In such policies there is a general

exception against suicide. If the person puts an end to his own life the next day, or a month after, or at any other period within the twelve months, there never was an idea in any man's breast that part of the premium should be returned.

A case of general practice was put by Mr. Dunning, where the words of the policy are, "At and from, provided the ship shall sail on or before the 1st of August;" and Mr. Wallace considers, in that case, that the whole policy would depend upon the ship sailing before the stated day. I do not think so; on the contrary, I think, with Mr. Dunning, that cannot be. A loss in port *before* the day appointed for the ship's departure can never be coupled with a contingency after the day; but if a question were to arise about it, as at present advised, I should incline to be of opinion that it would fall within the reasoning of the determination in *Stevenson v. Snow*, and that there were two parts or contracts of insurance, with distinct conditions. The first is, I insure the ship in port, provided she is lost in port before the 1st of August; and secondly, if she is not lost in port, I insure her then during her voyage from the 1st of August till she reaches the port specified in the policy. The loss in port must happen before the risk on the voyage could commence; and, *vice versa*, the risk in port must cease the moment the risk upon the voyage began.

Let us see, then, what the agreement of the parties is in the present case. They might have insured from two months to two months, or in any less or greater proportion, if they had thought proper so to do. But the fact is, that they have made *no division of time at all*; but the contract entered into is one entire contract from the 19th of August, 1776, to the 19th of August, 1777, which is the same as if it had been expressly said by the insured, "If you, the underwriter, will insure me for twelve months, I will give you an *entire* sum; but I will not have any apportionment." The ship sails, and the underwriter runs the risk for two months: no part of the premium then shall be returned. I cannot say, if there had been a recapture before the expiration of the twelve months, that the policy would not have revived.

ASTON, J.—This case depends upon the words of the policy, and I am of opinion it is one entire contract at a certain gross

sum of £9 per cent. for a certain period of time—viz., twelve months—and that no division is to be implied. The determination in *Stevenson v. Snow* went expressly upon this consideration, that there were *two distinct* voyages, and no consideration received by the insured for the premium upon the second voyage; and there certainly was not, for there never was any point of time when any risk was run from Portsmouth. In *Bond v. Nutt*, the losses insured against were distinct, and unconnected with each other: 1st, a loss of the ship in port, if any should happen there; 2d, a loss in her passage home, provided she sailed on a certain day. The risk in some policies may be distinct and divisible in its nature. In the case of an insurance upon a life, the sum is lumped, and the time is lumped for the year. So in this case, I think, the contract is one entire contract, and therefore that there ought to be no return of premium.

Mr. Justice Willes and Mr. Justice Ashurst were of the same opinion.

Nonsuit.

COURT OF COMMON PLEAS, 1811.

SMITH v. SCOTT.

(4 Taunt. 126.)

Insurance grants indemnity for loss by the perils specified, notwithstanding that the negligence of the assured or others may contribute.

This was an action upon a policy of insurance upon the ships *Helena* and *Merlin*, at and from the bay of Honduras to their port or ports of discharge in Great Britain, and a loss was averred to have happened to the *Helena* by circumstance, that, while she was proceeding on her voyage, a certain other ship on the high seas, by and through the force of the winds and waves, was carried and sailed against the *Helena*, without any neglect or default of the persons on board the *Helena*, and the *Helena* became lost and stranded by the perils of the seas. Upon the trial of the cause, at the London sittings, after Trinity term 1811, before Mansfield, C. J., the evidence was, that a ship named the *Margaret* ran foul of the *Helena* by the grossest neglect; for when, upon the shock being given, some of the *Helena's* crew went on board the *Margaret*, they found

only one man on the deck, and he was asleep. Hereupon it was objected by the counsel for the defendant, that the occasion of the injury was not the perils of the seas, but the gross negligence of the crew of the *Margaret*, and that this was a fatal variance from the loss averred. The jury, however, found a verdict for the plaintiff, subject to this point, which the chief justice reserved.

Accordingly, Lens, Serjt., on this day moved for a rule *nisi* to set aside the verdict and enter a nonsuit, adding that the plaintiff had his remedy against the owners of the *Margaret*.

MANSFIELD, C. J.—I do not know how to make this out not to be a peril of the sea. What drove the *Margaret* against the *Helena*? The sea. What was the cause that the crew of the *Margaret* did not prevent her from running against the other? Their gross and culpable negligence; but still the sea did the mischief. It is reasonable enough that the plaintiffs should permit the defendant to use their names as plaintiffs against the owners or crew of the *Margaret*, so as to recover whatever the plaintiffs would be entitled to as against the *Margaret*, and to apply it in diminution of their loss; but it would lead to endless discussion if it were required that no cause except the cause of loss alleged in the declaration should be conducive to the loss.

HEATH, J.—If this doctrine were to prevail, it might go still further, and it might be contended that, if a master conducts his ship so unskillfully as to run it on a rock, that is not a peril of the sea, but a peril of the unskillfulness of the master.

Rule refused.

CHAPTER II.

GENERAL PRINCIPLES.

Nature of the Contract.

EXCHEQUER CHAMBER, 1854.

DALBY v. INDIA & LONDON LIFE ASSUR. CO.

(15 C. B. 365.)

Insurance: how far a contract of indemnity, and when insurable interest must exist.

PARKE, B.—This case now comes before us on a bill of exceptions to the ruling of my brother Cresswell at *nisi prius*. It is an action on what is usually termed a policy of life assurance, brought by the plaintiff, as a trustee for the Anchor Assurance Company, upon a policy of £1,000 on the life of his late Royal Highness the Duke of Cambridge. The Anchor Life Assurance Company had insured the duke's life in four separate policies—two for £1,000 and two for £500 each—granted by that company to a Mr. Wright. In consequence of a resolution of their directors, they determined to limit their insurances to £2,000 on one life; and, this insurance exceeding it, they effected a policy with the defendants for £1,000 by way of counter-insurance. At the time the policy was subscribed by the defendants, the Anchor Company had unquestionably an insurable interest to the full amount. Afterwards an arrangement was made between the office and Mr. Wright for the former to grant an annuity to Mr. Wright and his wife, in consideration of a sum of money, and of the delivering up the four policies to be canceled, which was done; but one of the directors kept the present policy on foot by the payment of the premiums till the duke's death. It may be conceded for the purpose of the present argument that these transactions

between Mr. Wright and the office totally put an end to that interest which the Anchor Company had when the policy was effected, and in respect of which it was effected, and that at the time of the duke's death and up to the commencement of the suit the plaintiff had no interest whatever. This raises the very important question, whether, under these circumstances, the assurance was void, and nothing could be recovered thereon. We are all of opinion that it (the interest of the plaintiff which had terminated before the duke's death) was sufficient, and but for the case of *Godsall v. Boldero*, 9 East, 72, should have felt no doubt upon the question. *The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life; and when once fixed it is constant and invariable.* The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same on the other. *This species of insurance in no way resembles a contract of indemnity.* Policies of assurance against fire and against marine risks are both properly contracts of indemnity, the insurer engaging to make good, within certain limited amounts, the losses sustained by the insured in their buildings, ships, and effects. Policies on maritime risks were afterwards used improperly, and made mere wagers on the happening of those perils. This practice was limited by the 19 G. II., c. 37, and put an end to in all except a few cases; but at common law, before this statute with respect to maritime risks, and the 14 G. III., 3, c. 48, as to insurances on lives, it is perfectly clear that all contracts for wager policies and wagers which were not contrary to the policy of the law were legal contracts; and so it is stated by the court in *Cousins v. Nantes*, 3 Taunt. 315, to have been solemnly determined in the case of *Lucena v. Craufurd*, 2 Bos. & P. 324, 2 N. R. 269, without even a difference of opinion among all the judges. To the like effect was the decision of the court of error in Ireland, before all the judges except three, in *The British Insurance Co. v. Magee*, 1 Cooke & Alc. 182, that the assurance was legal at common law. Their contract,

therefore, in this case to pay a fixed sum of £1,000 on the death of the late Duke of Cambridge, would have been unquestionably legal at common law if the plaintiff had had an interest therein or not; and the sole question is whether this policy was rendered illegal and void by the provisions of the statute 14 G. III., c. 48. This depends upon its true construction. The statute recites that the making insurances on lives and other events, wherein the insured shall have no interest, hath introduced a mischievous kind of gaming, and for the remedy thereof it enacts (§1.) "that no insurance *shall be made* by any one on the life or lives of any person or persons, or on any other events whatsoever, wherein the person or persons for whose use and benefit or on whose account such policy shall be made *shall have* no interest, or by way of gaming and wagering; and that every assurance made contrary to the true intent and meaning thereof, shall be null and void, to all intents and purposes whatsoever." As the Anchor Assurance Company had unquestionably an interest in the continuance of the life of the Duke of Cambridge, and that to the amount of £1,000, because they had bound themselves to pay a sum of £1,000 to Mr. Wright on that event, the policy effected by them with the defendants was certainly legal and valid, and the plaintiff, without the slightest doubt, could have recovered the full amount if there were no other provision in the act. The contract is good at common law, and certainly not avoided by the first section of the 14 G. III., c. 48. This section, it is to be observed, does not provide for any particular amount of interest. According to it, if there was any interest, however small, the policy would not be avoided. The question arises on the third clause; it is as follows: "And be it further enacted, that in all cases where the insured *hath* interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the assured in such life or lives, or other event or events." Now, what is the meaning of this provision? On the part of the plaintiff it is said it means only that in all cases in which the party insuring has an interest when he effects the policy, his right to recover and receive is to be limited to that amount; otherwise, under color of a small interest, a wagering policy might be made to a large amount, as it might if the first clause stood alone. The right to

recover, therefore, is limited to the amount of the interest *at the time of effecting* the policy ; upon that value the assured must have the amount of premium calculated ; if he states it truly, no difficulty can occur ; he pays, in the annuity for life, the fair value of the sum payable at death. If he misrepresents by overrating the value of the interest, it is his own fault in paying more in the way of annuity than he ought, and he can recover only the true value of the interest in respect of which he effected the policy, but that value he can recover. Thus the liability of the assurer becomes constant and uniform, to pay an unvarying sum on the death of the *cestui que vie*, in consideration of an unvarying and uniform premium paid by the assured. The bargain is fixed as to amount on both sides. This construction is effected by reading the word "hath" as referring to the time of effecting the policy. By the first section the assured is prohibited from effecting an insurance on a life, or on an event wherein he "shall have" no interest—that is, at the time of assuring ; and then the third section requires that he shall recover only the interest that he "hath ;" if he has an interest when the policy is made, he is not wagering or gaming, and the prohibition of the statute does not apply to his case. Had the third section provided that no more than the amount or value of the interest should be insured, a question might have been raised, whether, if the insurance had been for a larger amount, the whole would not have been void ; but the prohibition to recover or receive more than that amount obviates any difficulty on that head. On the other hand, the defendants contend that the meaning of this clause is, that the assured shall recover no more than the value of the interest which he has at the time of the recovery, or receive more than its value at the time of the receipt. The words must be altered materially to limit the sum to be recovered to the value *at the time of the death*, or if payable at a time after death, when the cause of action accrues. But there is the most serious objection to any of these constructions. It is, that the written contract, which, for the reasons given before, is not a wagering contract, but a valid one, permitted by the statute, and very clear in its language, is by this mode of construction completely altered in its terms and effect. It is no longer a contract to pay a certain sum as the value of a then-existing

interest in the event of death, in consideration of a fixed annuity, calculated with reference to that sum, but a contract to pay, contrary to its express words, a varying sum, according to the alteration of the value of that interest at the time of the death or the accrual of the cause of action, or the time of the verdict or execution, and yet the price or the premium to be paid is fixed, calculated on the original fixed value, and is unvarying, so that the assured is obliged to pay a certain premium every year, calculated on the value of his interest at the time of the policy, in order to have a right to recover an uncertain sum, namely, that which happens to be the value of the interest at the time of the death or afterwards, or at the time of the verdict. He has not, therefore, a sum certain, which he stipulated for and bought with a certain annuity; but it may be a much less sum, or even none at all. This seems to us so contrary to justice and fair dealing, and common honesty, that this construction cannot, we think, be put upon the section. We should, therefore, have no hesitation, if the question were *res integra*, in putting the much more reasonable construction on the statute, that if there is an interest at the time of the policy it is not a wagering policy, and that the true value of that interest may be recovered, in exact conformity with the words of the contract itself. The only effect of the statute is to make the assured value his interest at its true amount when he makes the contract. But it is said that the case of *Godsall v. Boldero*, 9 East, 72, has concluded the question. Upon considering this case, it is certain that Lord Ellenborough decided it upon the assumption that a life policy was in its nature a contract of indemnity, as policies on marine risks and against fire undoubtedly are; and that the action was, in point of law, founded on the supposed damnification occasioned by the death of the debtor existing at the time of the action brought, and his lordship relied upon the decision of Lord Mansfield, in *Hamilton v. Mendes*, 2 Burr. 1270, that the plaintiff's demand was for an indemnity only. Lord Mansfield was speaking of a policy against marine risks, which is in its terms a contract for indemnity only. But that is not the nature of what is termed an assurance for life; it really is what it is on the face of it, a contract to pay a certain sum in the event of death; it is valid at common law, and, if

it is made by a person having an interest in the duration of the life, is not prohibited by the statute 14 G. III, c. 48.

Judgment reversed, and a venire de novo.

SUPREME COURT OF JUDICATURE, 1881.

RAYNER v. PRESTON.

(L. R., 18 Ch. D. 1.)

Insurance is a personal contract, and does not run with the title of the property insured.

This was an appeal from a judgment of Jessel, Master of the Rolls, dismissing the action. The plaintiffs purchased from the defendants a messuage and workshops. Between the date of the contract and the time fixed for completion, the buildings purchased were injured by fire. The vendors had before the contract insured the buildings against fire, but there was not in the contract any mention of this fact or of the policy. The plaintiffs brought an action to establish their right to a sum received by the vendors from the insurance office, or to have it applied in or towards reinstating the buildings injured. The Master of the Rolls decided against their claim, and from this decision the plaintiffs appealed.

It was contended by the appellants that they were entitled to the moneys (1) on general principles, irrespective of any special circumstances alleged to exist in the case; (2) under the provisions of the Act 14 Geo. III., c. 78, either alone or with the aid of the special circumstances of this case.

BRETT, L. J.—For a reason which will presently appear (viz., the different opinion of Lord Justice James), I give with some fear the result of the (I must say) very clear opinion which I have in this case.

This action is brought by the plaintiffs against the defendants to recover money which is in the hands of the defendants; and, therefore, if the action had been brought at common law, it would have been an action for money had and received. That action was always treated at common law as being founded upon equity, and therefore it seems to me that the decision in this case, whatever it ought to be, would be the

same whether it should be considered to be a decision at common law or in equity.

It seems to me that the question raised between the plaintiffs and the defendants calls upon us to consider, first of all, the nature of a policy of fire insurance; and, secondly, what was the relation with regard to the policy and to the property between the plaintiffs and the defendants in this case. Now, in my judgment, the subject-matter of the contract of insurance is money, and money only. The subject-matter of insurance is a different thing from the subject-matter of the contract of insurance. The subject-matter of insurance may be a house or other premises in a fire policy, or may be a ship or goods in a marine policy. These are the subject-matter of insurance, but the subject-matter of the contract is money, and money only. The only result of the policy, if an accident which is within the insurance happens, is a payment of money. It is true that, under certain circumstances, in a fire policy there may be an option to spend the money in rebuilding the premises; but that does not alter the fact that the only liability of the insurance company is to pay money. The contract, therefore, is a contract with regard to the payment of money, and it is a contract made between two persons, and two persons only, as a contract.

In this case there was a contract of insurance made between the defendants and the insurance company. That contract was made by the defendants, not on behalf of any undisclosed principal, not on behalf of any one interested other than themselves. The contract was made by the defendants solely and entirely on their own behalf, and at a time when they had no relation of any kind with the plaintiffs. It was a personal contract between the defendants and the insurance office, to which they were the sole parties. It is true that under certain circumstances a policy of insurance may, in equity, be assigned so as to give another person a right to sue upon it; but in this case the policy of insurance, as a contract, never was assigned by the defendants to the plaintiffs. It would have been assigned by the defendants to the plaintiffs if it had been included in the contract of purchase, but it was not. Any valuation of the policy, any consideration of increase of the price of the premises in consequence of there being a policy, was wholly omitted.

There was nothing given by the plaintiffs to the defendants for the contract. The contract, therefore, neither expressly nor impliedly, was assigned to the plaintiffs; and, so far as regards the contract of insurance, there never was any relation of any kind between the plaintiffs and the defendants.

But there did exist a relation between the plaintiffs and the defendants, not with regard to the subject-matter of the contract, but with regard to the subject-matter of the insurance. There was a contract of purchase and sale between the plaintiffs and the defendants in respect of the premises insured. It becomes necessary to consider accurately, as it seems to me, and to state in accurate terms, what is the relation between the two people who have contracted together with regard to premises in a contract of sale and purchase. With the greatest deference, it seems wrong to say that the one is a trustee for the other. The contract is one which a court of equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee. What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on two conditions: first of all, whether the title is made out, and, secondly, whether the money is ready; and unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed and the property never will be conveyed. But suppose at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now it has been suggested that when that takes place, or when a court of equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But, again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due and which have been received by the vendor between the time of the making of the contract and the time of completion;

but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase of which a court of equity will under certain circumstances decree a specific performance. But even if the vendor was a trustee for the vendee, it does not seem to me at all to follow that anything under the contract of insurance would pass. As I have said, the contract of insurance is a mere personal contract for the payment of money. It is not a contract which runs with the land. If it were, there ought to be a decree that upon the completion of the purchase the policy be handed over. But that is not the law. The contract of insurance does not run with the land; it is a mere personal contract, and unless it is assigned no suit or action can be maintained upon it except between the original parties to it.

I therefore, with deference, think that the plaintiffs here cannot recover from the defendants, on the ground that there was no relation of any kind or sort between the plaintiffs and the defendants with regard to the policy, and therefore none with regard to any money received under the policy.

JAMES, L. J.—I am unable to concur in affirming the judgment of the Master of the Rolls. According to my view of the case, the plaintiff's contention is founded not only on what I may call the natural equity which commends itself to the general sense of the lay world not instructed in legal principles, but also on artificial equity as it is understood and administered in our system of jurisprudence.

I am of opinion that the relation between the parties was truly and strictly that of trustee and *cestui que trust*. I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of

sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is, and has been a trustee, and the beneficial owner is, and has been a *cestui que trust*.

This being the relation between the parties, I hold it to be an universal rule of equity that any right which is vested in a trustee—any benefit which accrues to a trustee, from whatever source or under whatever circumstances, by reason of his legal ownership of the property—that right and that benefit he takes as trustee for the beneficial owner. If the policy of insurance in this case were a collateral contract, such as the policy which a creditor effects on the life of his debtor, the case would be wholly different. But the policy of fire insurance is not, in my opinion, a collateral contract, it is not a wagering contract, a contract that if a fire happens then a certain sum of money shall be paid to the insurer; it is in terms and in effect a contract that, if the property is injured then the insurance company will make good the actual damage sustained by the property. That damage, and that damage only, gives the right and is the measure of the right, and it seems to me impossible to say that it is not by reason of the legal ownership, and in respect solely of the injury done to that legal ownership, that the right to recover from the insurance company accrued to the insured. If the fire in this case had happened through the wrongful or negligent act of a third person while the contract was *in fieri* the legal right to sue for the damage would be in the vendor; but on the completion of the contract the purchaser would be entitled to use the name of the vendor as his trustee to sue for the damage so sustained, or, if the damages had actually been recovered in the interval, to recover the damages from the vendor. And it appears to me that there is no distinction in principle between this right and the right to use the vendor's

name in an action on the contract of indemnity against loss by fire which the policy of insurance is. It is not, in my view of the case, at all material to consider what would be the case if after actual conveyance and during the currency of the policy a fire had occurred. The vendor in that case would have no right as between him and the insurance office, and the purchaser would have no right of action, because one of the conditions of the policy excludes it, and, independently of that condition, the policy would, or might probably be held not to run with the land in the hands of the subsequent owner, and in that case there would not be that which is the foundation of the right—legal ownership and right in one person, and equitable ownership in another.

No doubt it is a mere accident that there was such a policy, and there was such a right. The vendee could not have complained if there had been no insurance. But that has occurred in a great variety of cases in which equitable rights have arisen. Where there is a creditor, a debtor, and a surety, and the surety finds out that by something to which he was not privy, and of which he had never heard, somebody else had become surety, or the creditor had obtained security, the surety has a right to obtain contribution from such surety, or to obtain such security as the case may be, and the creditor releasing such surety or parting with such security would probably find himself in considerable peril.

In the same city in which this controversy has arisen there occurred, some years ago, a great destruction of property by reason of an explosion of gunpowder, caused by a fire. Houses were damaged, not by fire; but by the explosion caused by a fire in another neighboring place. The insurance offices thought that it was for their interest to be very liberal, and treat the damage from the explosion as a damage by fire within the policies, and to pay accordingly. This was a mere act of liberality. They thought it was for their permanent benefit commercially to be liberal, and they were liberal accordingly. See *Taunton v. Royal Insurance Company*, 2 H. & M. 135. I cannot myself doubt, that if a trustee, or a vendor who had become trustee by the completion of his contract, had received this bounty, he would have received it by reason of his trusteeship, and would have had to give it up to his *cestui que trust* or purchaser.

BRETT, L. J.—I should like to add to what I have said, that I feel very great doubt whether, as between the defendants and the insurance company, the defendants can keep the moneys.

IN THE COURT OF APPEAL, 1883.

CASTELLAIN v. PRESTON.

(L. R., 11 Q. B. D. 380.)

The Doctrine of Subrogation as Related to Indemnity.

Appeal of the plaintiff from the judgment of Chitty, J., in favor of the defendants.

The plaintiff sued on behalf of the Liverpool and London and Globe Insurance Company, to recover a sum, £330 with interest since the 25th of September, 1878. On the 25th of March, 1878, the defendants, as owners of certain lands and buildings in Liverpool, effected an insurance on the buildings against loss by fire, and they kept the policy on foot by payment of the premiums until after the fire hereinafter mentioned occurred. The policy was in the usual form, giving the insurers the option of reinstating the property. On the 31st of July, 1878, the defendants contracted to sell the land and the buildings to their tenants, Messrs. Rayner, for the sum of £3,100, and they received a deposit. The contract provided that the time of the completion should be such day within two years from the date as the vendors should name.

On the 15th of August in the same year, a fire occurred, damaging part of the buildings. A claim was made on behalf of the defendants, and after negotiation as to the sum to be paid, the amount of the claim was ultimately fixed at £330, and that sum was in fact paid on the 25th of September, 1878, by the insurers, who were at that time ignorant of the existence of the contract for sale. On the 25th of March, 1879, the defendants named the 5th of May as the day of completion, and on the following 12th of December the conveyance was executed and the balance of the purchase money paid.

BRETT, L. J.—In this case the action is brought by the plaintiff as representing an insurance company against the defendants, in respect of money which has been paid by that

company to the defendants on account of the loss by fire of a building. The defendants were the owners of property consisting partly, at all events, of a house, and the defendants had made a contract of sale of that property with third persons, which contract, upon the giving of a certain notice as to the time of payment, would oblige those third persons, if they fulfilled the contract, to pay the agreed price for the sale of that property, a part of which was a house, and according to the peculiarity of such a sale and purchase of land or real property the vendees would have to pay the purchase money, whether the house was, before the date of payment, burnt down or not. After the contract was made with the third persons, and before the day of payment, the house was burnt down. The vendors, the defendants, having insured the house in the ordinary form with the plaintiff's company, it is not suggested that, upon the house being burnt down, the defendants had not an insurable interest. They had an insurable interest, as it seems to me; first, because they were at all events the legal owners of the property; and, secondly, because the vendees or third persons might not carry out the contract, and if for any reason they should never carry out the contract, then the vendors, if the house was burnt down, would suffer the loss. Upon the happening of the fire the defendants made a claim on the insurance company represented by the plaintiff, and were paid a certain sum which represented the damage done to the house. After that, the contract of sale between the defendants and the third persons, the vendees of the property, was carried out, and the full amount of the purchase-money was paid by the third persons to the defendants notwithstanding the fire. Under those circumstances, the plaintiff representing the insurance company brings this action; I do not say that he brings it to recover back the money which has been paid by the insurance company (for that expression of opinion would rather interfere with the form of the action), but he brings the action in respect of that money.

The question is whether this action is maintainable. The case was tried before Chitty, J., and he in a very careful and elaborate judgment (8 Q. B. D. 613) has come to the conclusion that the insurance company cannot recover against the defendants in respect of the money paid by them. It seems to

me that the foundation of his judgment is this, that he considers that the doctrine of subrogation of the insurer into the position of the assured is confined within limits which prevent it from extending to the present case. I must now consider whether I can agree with him.

In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this; namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance; and if ever a proposition is brought forward which is at variance with it—that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity—that proposition must certainly be wrong.

In the course of this discussion many propositions and rules well known in insurance law have been glanced at. For instance, to speak of marine insurance, the doctrine of a constructive total loss originated solely to carry out the fundamental rule which I have mentioned. It was a doctrine introduced for the benefit of the assured; for, as a matter of business, a constructive total loss is equivalent to an actual total loss; and if a constructive total loss could not be treated as an actual total loss, the assured would not recover a full indemnity. But grafted upon the doctrine of constructive total loss came the doctrine of abandonment, which is a doctrine in favor of the insurer or underwriter, in order that the assured may not recover more than a full indemnity. The doctrine of constructive total loss, and the doctrine of notice of abandonment ingrafted upon it, were invented or promulgated for the purpose of making a policy of marine insurance a contract of indemnity in the fullest sense of the term. I may point out that the doctrine of notice of abandonment is most difficult to justify upon principle; it was introduced rather as a matter of justice in favor of the underwriters, so as to

prevent the assured from obtaining by fraud more than a full indemnity. That doctrine is to a certain extent technical; that is to say, although the assured has in reality suffered a constructive total loss, and although he is upon general principles entitled to recover, nevertheless he must fail unless he has given a notice of abandonment. I suppose that the doctrine of notice of abandonment was originally introduced by merchants and underwriters, and afterwards adopted as part of the law as to marine insurance; but at first sight it seems a mere encroachment of the judges.

I have mentioned the doctrine of notice of abandonment for the purpose of coming to the doctrine of subrogation. That doctrine does not arise upon any of the terms of the contract of insurance; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned, and it is a doctrine in favor of the underwriters or insurers, in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason. It is not, to my mind, a doctrine applied to insurance law on the ground that underwriters are sureties. Underwriters are not always sureties. They have rights which sometimes are similar to the rights of sureties, but that again is in order to prevent the assured from recovering from them more than a full indemnity. But it being admitted that the doctrine of subrogation is to be applied merely for the purpose of preventing the assured from obtaining more than a full indemnity, the question is, whether that doctrine as applied in insurance law can be in any way limited. Is it to be limited to this, that the underwriter is subrogated into the place of the assured so far as to enable the underwriter to enforce a contract, or to enforce a right of action? Why is it to be limited to that, if when it is limited to that, it will in certain cases enable the assured to recover more than a full indemnity? The moment it can be shown that such a limitation of the doctrine would have that effect, then, as I said before, in my opinion, it is contrary to the foundation of the law as to insurance, and must be wrong. And, with the greatest deference to my brother Chitty, it seems to me that that is the fault of his judgment. He has by his judgment limited this doctrine of subrogation to placing the insurer in

the position of the assured only for the purpose of enforcing a right of action, to which the assured may be entitled. In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used, that is to say, the insurer must be placed in the position of the assured. Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavor to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated. But it will be observed that I use the words "of every right of the assured." I think that the rule does require that limit. In *Burnand v. Rodocanochi*, 7 App. Cas. 333, the foundation of the judgment to my mind was, that what was paid by the United States Government could not be considered as salvage, but must be deemed to have been only a gift. It was only a gift to which the assured had no right at any time until it was placed in their hands. I am aware that with regard to the case of reprisals, or that which a person whose vessel has been captured got from the English Government by way of reprisal, the sum received has been stated to be, and perhaps in one sense was, a gift of his own Government to himself, but it was always deemed to be capable of being brought within the range of the law as to insurance, because the English Government invariably made the "gift," so invariably that as a matter of business it had come to be considered as a matter of right. This enlargement, or this explanation, of what I consider to be the real meaning of the

doctrine of subrogation, shows that in my opinion it goes much further than a mere transfer of those rights which may at any time give a cause of action either in contract or in tort, because if upon the happening of the loss there is a contract between the assured and a third person, and if that contract is immediately fulfilled by the third person, then there is no right of action of any kind into which the insurer can be subrogated. The right of action is gone; the contract is fulfilled. In like manner, if upon the happening of a tort the tort is immediately made good by the tortfeasor, then the right of action is gone; there is no right of action existing into which the insurer can be subrogated. It will be said that there did for a moment exist a right of action in favor of the assured, into which the insurer could have been subrogated. But he cannot be subrogated into a right of action until he has paid the sum insured and made good the loss. Therefore innumerable cases would be taken out of the doctrine, if it were to be confined to existing rights of action. And I go further and hold that if a right of action in the assured has been satisfied, and the loss has been thereby diminished, then, although there never was nor could be any right of action into which the insurer could be subrogated, it would be contrary to the doctrine of subrogation to say that the loss is not to be diminished as between the assured and the insurer by reason of the satisfaction of that right. I fail to see at present, if the present defendants would have had a right of action at any time against the purchasers, upon which they could enforce a contract of sale of their property whether the building was standing or not, why the insurance company should not have been subrogated into that right of action. But I am not prepared to say that they could be, more particularly as I understand my learned brother, who knows much more of the law as to specific performance than I do, is at all events not satisfied that they could. I pass by the question without solving it, because there was a right in the defendants to have the contract of sale fulfilled by the purchasers notwithstanding the loss, and it was fulfilled. The assured have had the advantage, therefore, of that right; and by that right, not by a gift which the purchasers could have declined to make, the assured have recovered, notwithstanding the loss, from the purchasers, the very sum of money which they were to obtain

whether this building was burnt or not. In that sense I cannot conceive that a right, by virtue of which the assured has his loss diminished, is not a right which, as has been said, affects the loss. This right, which was at one time merely in contract, but which was afterwards fulfilled, either when it was in contract only, or after it was fulfilled, does affect the loss; that is to say, it affects the loss by enabling the assured, the vendors, to get the same money which they would have got if the loss had not happened.

While I am applying the doctrine of subrogation which I have endeavored to enunciate, I think it due to Chitty, J., to point out what passages in his judgment require some modification. I find him reading this passage: "I know no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss." That is a quotation from Lord Cairns, in *Simpson v. Thomson*, 3 App. Cas. 284. The learned judge then goes on: "What is the principle of subrogation? On payment the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against." That is, as it seems to me, to confine this doctrine of subrogation to the principle that the insurers are entitled to enforce all remedies, whether in contract or in tort. I should venture to add this: "And if the assured enforces or receives the advantage of such remedies, the insurers are entitled to receive from the assured the advantage of such remedies." Then, when we come to this illustration, "Where the landlord insures, and he has a covenant by the tenant to repair, the insurance office, on payment in like manner, succeeds to the right of the landlord against his tenant;" I would add this: "And if the tenant does repair, the insurer has the right to receive from the assured a benefit equivalent to the benefit which the assured has received from such repair." Then, dealing with the case of *Burnand v. Rodocanochi*, 7 App. Cas. 333, the learned judge cites the opinion of Bramwell, L. J. He says that Bramwell, L. J., in his judgment held that

it was not salvage, but "that in the circumstances the sum received by the ship-owner was but a pure gift, and there was no right on the part of the insurers to recover any part of it over against him." I, for myself, venture to add this as the reason: "Because there was no right in the assured to demand the compensation from the American Government." There was no right to demand it; it was bestowed and received as a pure gift. *Darrell v. Tibbitts*, 5 Q. B. D. 560, seems to me to be entirely in favor of the plaintiff in this case. I shall not retract from the very terms which I used in that case. It seems to me that in *Darrell v. Tibbitts* the insurers were not subrogated to a right of action, or to a remedy. They were not subrogated to a right to enforce the remedy, but what they were subrogated into was the right to receive the advantage of the remedy which had been applied, whether it had been enforced, or voluntarily administered by the person who was bound to administer it. That seems to me to be the doctrine. Then with regard to the passage: "The doctrine is well established that where something is insured against loss, either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured," I wish to explain that that was a distinct clause, and it was so intended by me when I stated it. I then mentioned contracts: "And with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against."

I fail to conceive any contract which gives a right over the thing insured, which is not affected by the loss or safety of it, and if it is necessary to bring the present case within those terms, it seems to me that the contract of purchase and sale was affected by that loss. I will not go further with the judgment of Chitty, J., except to say this, that at the end my learned brother has put it thus, that "the only principle applicable is that of subrogation as understood in the full sense of that term." There I agree with him, only my view of the full sense is larger than that which he adopted. "And that where the right claimed is under a contract between the insured and

third parties, it must be confined to the case of a contract relating to the subject-matter of the insurance, which entitled the insurers to have the damages made good." I think it would be better expressed in this way: "Which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened." If it is put in that sense, it seems to me to be consistent with the proposition which I laid down at the beginning of what I have said, and to cover this case. I will repeat it: "Which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened." The contract in the present case, as it seems to me, does enable the assured to be put by the third party into as good a position as if the fire had not happened, and that result arises from this contract alone. Therefore, according to the true principles of insurance law, and in order to carry out the fundamental doctrine, namely, that the assured can recover a full indemnity, but shall never recover more, except, perhaps, in the case of the suing and laboring clause under certain circumstances, it is necessary that the plaintiff in this case should succeed. The case of *Darrell v. Tibbitts*, 5 Q. B. D. 560, has cut away every technicality which would prevent a sound decision. The doctrine of subrogation must be carried out to the full extent, and carried out in this case by enabling the plaintiff to recover.

COTTON, L. J.—In this case the appellant's company insured a house belonging to the defendants, and before there was any loss by fire the defendants sold the house to certain purchasers. Afterwards there was a fire, and an agreed sum was paid by the insurance office to the defendants in respect to the loss. The appellant apparently seeks to recover the sum which the office paid to the defendants, and if the plaintiff's claim could be shaped only in this form, I think my opinion would be against him. The plaintiff's claim may be treated in substance in another way; namely, the company seek to obtain the benefit, either wholly or partly, of the amount paid by them out of the purchase money which the defendants have received since the fire from the purchasers. In my opinion, the plaintiff is right in that contention. I think that the

question turns on the consideration of what a policy of insurance against fire is, and on that the right of the plaintiff depends. The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against, which has happened, and from that it follows, of course, that as it is only a contract of indemnity, it is only to pay that loss which the assured may have sustained by reason of the fire which has occurred. In order to ascertain what that loss is, everything must be taken into account which is received by and comes to the hand of the assured, and which diminishes that loss. It is only the amount of the loss, when it is considered as a contract of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss. If the proposition is stated in that manner it is clear that the office would be entitled to the benefit of anything received by the assured before the time when the policy is paid, and it is established by the case of *Darrell v. Tibbitts*, 5 Q. B. D. 560, that the insurance company is entitled to that benefit, whether or not before they pay the money they insist upon a calculation being made of what can be recovered in diminution of the loss by the assured; if they do not insist upon that calculation being made, and if it afterwards turns out that in consequence of something which ought to have been taken into account in estimating the loss, a sum of money, or even a benefit, not being a sum of money, is received, then the office, notwithstanding the payment made, is entitled to say that the assured is to hold that for its benefit, and although it was not taken into account in ascertaining the sum which was paid, yet when it has been received it must be brought into account, and if it is not a sum of money, but a benefit that has been received, its value must be estimated in money. Now Lord Blackburn, in the case of *Burnand v. Rodocanochi*, 7 App. Cas. 339, states the principle in these words: "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land, or any other contract of indemnity), and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already

paid it, then if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back." In *Darrell v. Tibbitts*, to which I have already referred, the question which we had to consider was whether the insurance office was entitled to the benefit produced in consequence of a covenant to repair if the building should be damaged by an explosion of gas. In my opinion it was not intended in any way to limit the right of the insurer, as an insurer, to cases where the contract in respect of which benefit had been received related to the same loss or damage as that against which the contract of indemnity was created by the policy. That was what was before this court in that case, and undoubtedly expressions do occur as to a contract relating to the loss or affecting the loss; but the principle was not limited to contracts. The principle which I have enunciated goes further, and if there is a money or any other benefit received which ought to be taken into account in diminishing the loss or in ascertaining what the real loss is against which the contract of indemnity is given, the indemnifier ought to be allowed to take advantage of it in order to calculate what the real loss is, even although the benefit is not a contract or right of suit which arises and has its birth from the accident insured against. Of course, the difficulty is to consider what ought to be taken into account in estimating that loss against which the insurer has agreed to indemnify, and we have been pressed in argument with many difficulties. One which possibly was put to us most strongly, was that the contract of sale has nothing to do with destruction by fire, and if any part of the purchase money is to be taken into account, why is a gift not to be taken into account? That may be said to diminish the loss as well as a contract of sale. The answer is that when a gift is made afterwards in order to diminish the loss, it is bestowed in such terms as to show an intention to benefit the assured, and to give the insurer the benefit of that would be to divert the gift from its intended object to a different person. That really was what was decided in *Burnand v. Rodocanochi*. There the money bestowed, not as a matter of right, but as a gift, was intended to benefit the assured beyond the amount which they had got in consequence of

any insurance. There is another ground which may possibly exclude gifts. It may be that the right of the insurer to have a sum brought into account in diminution of the loss, against which he has given a contract of indemnity, is confined to that which is a right or other incident belonging to the person insured, as an incident of the property at the time when the loss takes place. This definition would not include a sum subsequently bestowed on the assured by way of gift, for it can in no way be said to have been appertaining to him as owner of the property at the time when the loss took place. But, in the present case, what we have to consider is whether the contract of sale is not an incident of the property, belonging to the owners at the time of the loss in such a way that it ought to be brought into account in estimating the loss, against which the insurer has undertaken to indemnify. What was the position of the parties? The defendants' house was insured, and there was a loss from fire, the damage caused by the fire being estimated by the parties at £330. Ultimately, the property having been already agreed to be sold at a fixed price, the assured received the whole amount of that price. Now they did that in respect of a contract relating to the subject insured, the house; and, to my mind, if they received the whole amount of the price which they previously had fixed as the value of the house, that must of necessity be brought into account when it was received, for the purpose of ascertaining what was the ultimate loss against which they had concluded a contract of indemnity with the insurance office. Here the purchasers have paid the money in full, and as the property was valued between the vendors and the purchasers at £3,100, the vendors got that sum in respect of that which had been burned, but which had not been burned at the time when the contract was entered into. They had fixed that to be the value, and then any money which they get from the purchasers, and which together with £330, the sum paid by the office, exceeds the value of the property as fixed by them under the contract to sell, must diminish, and in fact entirely extinguishes the loss occasioned to the vendors of the property by the fire. Therefore, though it cannot, to my mind, be said that the insurers are entitled, because the purchase is completed, to get back the money which they have paid, yet they are entitled to

take into account the money subsequently received under a contract for the sale of the property existing at the time of the loss, in order to see what the ultimate loss was against which they gave their contract of indemnity. On the principle of *Darrell v. Tibbetts*, when the benefit afterwards accrued by the completion of the purchase, the insurance company were entitled to demand that the money paid by them should be brought into account. Therefore the conclusion at which I have arrived is, that if the purchase money has been paid in full, the insurance office will get back that which they have paid, on the ground that the subsequent payment of the price which had been before agreed upon, and the contract for payment of which was existing at the time, must be brought into account by the assured, because it diminishes the loss against which the insurance office merely undertook to indemnify them. In my opinion, therefore, the decision below was erroneous. I think Chitty, J., based it upon this, that in this case there was no right of subrogation, no contract which the office could have insisted upon enforcing for their benefit. I think it immaterial to decide that question, because the vendors have exercised their right to insist upon the completion of the purchase.¹

Judgment reversed.

¹ Here follows a long opinion by Bowen, L. J.

It is not probable that the doctrine of this case will prevail in the United States. Compare *Nelson v. Bound Brook Mut. Fire Ins. Co.*, 43 N. J. Eq. 256. *King v. State Mut. Fire Ins. Co.*, 7 Cush. 1. *International Trust Co. v. Boardman*, 149 Mass. 161. *Insurance Co. v. Updegraff*, 21 Pa. St. 513. *Clinton v. Hope Ins. Co.*, 45 N. Y. 454. *Smith v. Glens Falls Ins. Co.*, 62 N. Y. 85. See *supra* §§ 32, 158.

CHAPTER III.

GENERAL PRINCIPLES.

Consummation and Construction of the Contract.

SUPREME COURT OF JUDICATURE, 1889.

THOMPSON v. ADAMS.

(L. R., 23 Q. B. D. 361.)

A valid agreement to insure may be closed either by parol or by a binding slip.

MATHEW, J.—This was an action brought to recover the sum of £100, which it was alleged by the plaintiffs the defendant had agreed to cover by an insurance against fire upon the goods of the plaintiffs in premises of theirs in New Zealand. The action was resisted on the ground that there had been no contract of insurance, or in the alternative, if there had been a contract of insurance, that it was subject to conditions which had not been fulfilled, and, therefore, that the underwriters were not liable.

The plaintiffs are merchants carrying on business in New Zealand, and they were represented in this country by a firm of Geard & Sons, who acted for them under a power of attorney. They instructed Geard & Sons to effect insurances upon goods on their premises in New Zealand; and Messrs. Geard & Sons, for that purpose, about the month of October, 1886, placed themselves in communication with a firm of insurance brokers of high standing, Messrs. Collins & Co., who undertook to endeavor to effect insurances to the amount of £20,000. Now, insurances had been effected in the same way previously, and amongst the insurances previously effected were some at Lloyd's. It appears, within the last four or five years the underwriters at Lloyd's have undertaken, in addition to their ordinary business, the business of insurances against risks

on land—against fire risks—and insurances had for this period been effected at Lloyd's by Messrs. Thompson; and Mr. Adams, the present defendant, it appeared, had taken a line on some of the previous policies. Messrs. Collins & Co., not being members of Lloyd's, had placed themselves in communication with Mr. Bray, an insurance broker, who was entitled to effect insurances at Lloyd's; and Mr. Bray, in accordance with the usual course of business, prepared a slip containing the particulars of the proposed insurances, and showing the risk in the same way as if it were a marine risk to the underwriters at Lloyd's. Amongst others the risk was shown to the defendant, who initialed the slip on behalf of others whom he represented for £300, of which £100 represented the amount of his insurance.

In the ordinary course with reference to risks of this description, as well as with reference to maritime risks, the slip is followed by a policy of insurance. In the particular case the slip was initialed in October, 1886. The policy ought to have been put forward through the broker and signed by the underwriters; but, strange to say, no policy was tendered for signature down to the end of the month of February following. On February 28th news reached this country that the premises of the plaintiffs had been burnt down on the previous day, and a quantity of their goods destroyed. Up to this time, as no policy had been issued, no premiums had been paid, but upon March 1st the premiums upon all the insurances were paid by the plaintiffs to Messrs. Collins & Co. The defendant, however, with other underwriters, refused to accept the premium, or to sign a policy, or to pay the amount for which the slip had been initialed. Upon that the claim was put forward against the defendant upon the slip, and it was asserted by the plaintiffs that the slip was a sufficient insurance under the circumstances, and that the fact that no policy had subsequently been signed was immaterial. The defendant set up as a defense the absence of the policy, and declined to pay. Under those circumstances it was that the action was brought against him.

Now several lines of defence were adopted by the defendant before me, and were argued with great ability on his behalf. In the first place it was said there was no policy of insurance. In the second place it was said, as I have

already mentioned, that if there were any contract of insurance, it was a contract subject to the condition that a policy should be subsequently issued. Thirdly, it was said that in the particular case the conduct of the plaintiffs and their agents showed that they had abandoned the insurance, and elected not to complete it by a policy, and, therefore, that the defendant was not liable. It was said that it was a breach of good faith on the part of the plaintiffs to put forward a policy which never would have been put forward if the fire had not occurred.

It was said that this alleged contract was only to be gathered from the slip initialed by the underwriters, but that the slip was no contract; that it was only an honorary undertaking on the part of the underwriters to make a contract subsequently, and that being so, the underwriters chose in the present case not to be bound by it. It was alleged that it was right and fair, under the circumstances, that they should not be bound by it, and that, therefore, there was an end of the matter. I had evidence laid before me with reference to this curious point, for it strikes one at first glance that it was certainly a most extraordinary course of business that the underwriters were setting up. They were suggesting that it should be taken that this slip was procured, not for the purpose of securing protection to the assured, but of getting a piece of paper with some writing upon it, which had no meaning whatever in point of law. That did not seem very likely. One knows how important it is that there should be a prompt insurance in respect of goods against fire risks. Considering how great the risk is to an individual, and how small a premium he has to pay, the great object is to get himself insured against damage by fire, and according to this theory no man could effect a prompt insurance at Lloyd's against damage by fire. There must be an interval between the slip and the subsequent policy, and that interval would leave the underwriter free, if he thought proper not to accept the risk. Approaching the consideration of the evidence by the light of common sense, I was prepared for the result. The plaintiff's witnesses all said that the slip was a contract, and regarded as a binding legal contract to effect a subsequent insurance. There is no statutory difficulty in the way, and no reason why the slip should

not be a binding contract, and there is every reason for supposing that such would be the intention of the person presenting the slip to be initialed in respect of the risk. On the other hand, there was the evidence of the underwriters, and the underwriters sought to set up a custom to treat these slips as honorary undertakings only. It has become manifest that they could not rely upon a single fact to prove the existence of the alleged custom, and that they were only treating me with what a judge has so often to hear, an opinion—a strong opinion—of the witnesses on the one side as to the merits of the case, and of what the result of the litigation ought to be. All these gentlemen thought it was very wrong under the circumstances of this case that this slip should be anything more than an undertaking, out of which the underwriter could get if he thought fit. Some light was thrown upon the value of their opinion by the evidence of one of the principal witnesses, who said: “I regard this slip against fire risks in the same way as a slip against marine risks, and a slip against marine risks is only an undertaking in honor, because the statute forbids that it should be more, and I consider the statute applies to an insurance against fire, and therefore it is to be treated exactly as the same thing, and that is the custom at Lloyd’s.” Unfortunately, the reasoning broke down, because the statute does not apply, and there is no reason why a contract should not be entered into by the slip; there is every reason, indeed, to suppose that the parties would intend it to be a contract, and upon that point I am against the defendant. I think there was a binding contract to insure, and that the contract contained in the slip is not one from which the underwriter could escape on the ground that it was only optional whether or not he should go on with the contract, and perfect it by a policy of insurance.

Then there was an alternative point, and it was that to which Mr. Barnes bent all his energy; he said, assuming that this slip is to be treated as a protecting note, like that which is ordinarily issued by an insurance company (for insurance companies recognize the necessity for prompt insurance, and before the policy is issued they will issue a protecting note which will have all the effect of a policy until the document has been prepared), still there ought to be read into this slip an implied con-

dition. An implied condition is a condition to be proved by circumstantial evidence, not by anything that passes in a particular case in terms between the plaintiff and the defendant, but a contract to be inserted because the conduct of the parties shows it is the basis of the whole arrangement. The proviso, said Mr. Barnes, that I ask to read in is this : the contract contained in the slip is to be upon the condition, that within a reasonable time the policy is put forward for signature, and if it be not put forward within a reasonable time the insurance is to be at an end. That was the proviso that I was asked to insert, as it were, in this slip ; and really the sole ground upon which that argument rested appeared to me to be that there is an interval ordinarily between the date of the slip and the time when the policy is sent. The course of business is, that, after the slip has been completely initialed, the policy should be prepared by the broker (Mr. Bray in this case), and submitted to the different underwriters ; and when they have signed the policy, as a matter of business, the amount of the premium appears for the first time in the accounts, and the contract is supposed to be complete in all formal particulars. Now, that is inevitable. That delay between the slip and the policy it is impossible to avoid. In the first place, it is not because a particular underwriter initials a slip, that the matter is completed at Lloyd's, or completed anywhere else. The broker has to go round and get all the risk covered ; but, further, he has to obtain in many cases precise information as to the nature of the risk—what is called technically the wording—and when the property insured is property abroad, the interval would be longer, necessarily, than if it were at home. On this point again I had a great body of evidence laid before me on each side. The plaintiff's witnesses said the delay is nothing ; the matter is complete when the slip is initialed. That is the business view of the affair. The underwriters are none the worse off for any delay : they very often do not trouble themselves very much as to the time the policy comes forward ; and in support of that view the plaintiffs produced a number of slips, some initialed by the defendant himself, in which it appeared there had been a long interval, of weeks and months in some instances, between the date of the slip and the date of the policy. On the other hand, witnesses were called for the defendant, who said that the

understanding was that the policy was to be put forward promptly, and if it was not put forward the transaction ought to be regarded as being at an end. But, again, no single instance could be adduced by any of those witnesses to throw light on a supposed course of business, and I am satisfied that the defendant's contention upon this point is wrong. See what the consequences would be of adopting their view. If such a clause was to be written into the policy, there must necessarily be an interval of time between initialing the slip and the completion of the policy, during which preparations would be made for laying the policy before the underwriters for their signature. What is the position of the underwriter meanwhile? Clearly he is on the risk. Then, according to the argument, if the policy be put forward within a reasonable time he is bound to sign it, legally bound to sign it. Then, in the interval, he is upon the risk; but, according to the defendant's argument, this proviso would enable the assured, at the expiration of a reasonable time, to be off. Having kept the underwriter on the risk, and the interval being so ended, he could say: I avail myself of that proviso, which is to be treated as part of the slip, and I get rid of my liability to pay the premium. When the defendant's witnesses were examined, they were compelled to prove a course of conduct which was totally inconsistent with such a state of things, because it was proved, that, when there was delay, repeated demands were made by the underwriters themselves as to the reason for the delay. There was one answer of the defendant which really put him out of court on this matter. He was asked: "Now, if no fire had occurred in this case, and the premium had been tendered to you in the month of February, would you have taken it?" "Yes," he said, "I should have regarded the tender of the premium as an indication of good faith, and I should have signed the policy."

That seems to me to make an end of that point which had been made by the defendant. From the evidence, I find, as a fact, that there is necessarily an interval between the slip and the policy in all these cases; and I am satisfied that it would be most unreasonable to read such an implied contract into the slip. There must be judgment for the plaintiffs upon the issues tried before me.

Judgment for the plaintiffs.

NEW YORK COURT OF APPEALS, 1890.

LIPMAN v. NIAGARA FIRE INS. CO.

(121 N. Y. 454.)

The contract, whether closed by parol or binding slip, is subject to the terms of the usual policy.

Appeal from judgment of the General Term of the Supreme Court entered upon an order which affirmed a judgment in favor of plaintiff entered upon a verdict.

This was an action upon an agreement of insurance evidenced by what is termed by insurance men a "binding slip," which was in these words:

"PELL, WALLACK & CO., INSURANCES,
55 LIBERTY STREET, NEW YORK, September 2, 1885.

"The undersigned do insure for account of Shaped Seamless Stocking Co. amounts as specified below at 1 $\frac{1}{4}$ for 12 months from September 2, 1885, on machinery and stock, building No. 3 (as per form, building situate Randall's Island, N. Y.). This receipt binding until policy is delivered at the office of Pell, Wallack & Co.

Company.	Amount.	Accepted by.
Niagara.....	\$2,500	Pollock."

ANDREWS, J.—The binding slip signed by the defendant was not a mere agreement to insure, but was a present insurance to the amount specified therein. The instrument is informal. It states on whose account the insurance is made, the property covered, the amount insured, the term of insurance, and the date. But it does not specify the risk insured against, nor does it contain any conditions such as are usually found in insurance policies. The evident design of the writing, as disclosed by the testimony, was to provide temporary insurance pending an inquiry by the company as to the character of the risk, or, if that was known, during any delay in issuing the policy. The secretary of the defendant signed the binding slip upon the solicitation of Pell, Wallack & Co., insurance brokers of the plaintiff, in the afternoon of September 2, 1885. The officers of the defendant, having made inquiry as to the risk, notified the plaintiff's brokers before one o'clock of the afternoon of September 3, that the

defendant declined it. The property described in the binding slip was destroyed by fire in the afternoon of September 3, the fire having commenced about three o'clock.

The claim on the one side is that the binding slip was a complete and perfect contract, binding the defendant, according to its language, "until policy is delivered at the office of Pell, Wallack & Co.," and not terminable, therefore, by notice prior to that time, or, if so terminable, then only upon reasonable notice, which, as is claimed, was not given, nor in any event upon notice to the plaintiff's brokers, they not being agents of the plaintiff for the purpose of receiving such notice.

It is insisted on the other side that the contract evidenced by the binding slip was a contract subject to the conditions contained in the ordinary policy in use by the company, one of which contained the following clause:

"This insurance may be determined at any time by request of the assured, or by the company on giving notice to that effect to the assured, or to the person who may have procured this insurance to be taken by this company."

The notice given on the 3d of September prior to the fire terminated, as is insisted, the contract of insurance pursuant to this condition. We think there can be no doubt that the true construction of the binding slip only obligated the defendant according to the terms of the policy in ordinary use by the company. There is no other reasonable interpretation of the transaction. The binding slip was a short method of issuing a temporary policy for the convenience of all parties, to continue until the execution of the formal one. It would be unreasonable to suppose either that the brokers expected an insurance except upon the usual terms imposed by the company, or that the secretary of the company intended to insure upon any other terms. The right of an insurance company to terminate a risk is an important one. It is not reserved in terms in the binding slip, and could not be exercised at all so long as no policy should be issued, unless the condition in the policy is deemed to be incorporated therein.

Upon the plaintiff's contention the company could not cancel the risk so long as the binding slip was in force, and the only remedy of the company to get rid of the risk would be to issue the policy and then immediately cancel it. The binding

slip was a mere memorandum to identify the parties to the contract, the subject-matter, and the principal terms. It refers to the policy to be issued. The construction is, we think, the same as though it had expressed that the present insurance was under the terms of the usual policy of the company to be thereafter delivered.

The trial judge was of opinion that the binding slip was not a complete and independent contract of insurance, subject to no conditions; but he ruled that the obligation of the defendant was to be determined by the question, whether the condition in the defendant's policy, that the company might terminate the policy by notice to the "person who procured the insurance," was a usual one, and submitted the case to the jury on that issue. The case of *DeGrove v. Metropolitan Ins. Co.*, 61 N. Y. 594, is, we think, a decisive authority against the view of the learned trial judge. The General Term dissented from the ruling of the trial judge on this point, and held that notice to Pell, Wallack & Co., the brokers who procured the insurance, was authorized by the condition in the policy. It, however, sustained the judgment on the ground that notice did not terminate the contract until a reasonable time had elapsed after it was given, and that the two and a half hours which intervened between the notice and the happening of the fire was not such reasonable time, and that consequently the insurance was then in force.

We think there can be no reasonable doubt, upon the language of the condition, that notice to the brokers was a good notice, and that, if otherwise sufficient, it terminated the defendant's liability. The brokers procured the insurance. In fact, their duties in respect to it had not terminated. The binding slip provided that the policy, when issued, should be delivered at their office. The notice was given to persons to whom notice might be given by the express language of the policy. The special language of the condition in the defendant's policy upon this point was, it is said, inserted to meet the objection pointed out by this court in *Hermann v. Niagara Fire Ins. Co.*, 100 N. Y. 415.

It remains to consider whether under the condition the policy terminated *eo instanti* on notice by the company. There is no language which postpones the effect of notice until the

lapse of a reasonable time thereafter. The rule is well settled, that, where a person undertakes to do an act upon notice from another, it is implied that he shall have a reasonable time after he is called upon to do the thing, or render the service, and, no time for performance being specified, the law gives him a reasonable time. But where a contract fixes the time of performance the rule of reasonable time has no application. We have been referred to no case, nor have we found any, which sanctions the doctrine, that, where one has assumed an obligation which is to continue until notice given to the other party, the obligation continues after notice. If in this case the premium has been paid beyond the period when notice was given, then the bare notice would not have terminated the risk. But this for the reason that the company is bound in such case, in order to terminate the policy, not only to give notice, but to refund or offer to refund the insurance premium. This is the construction placed on clauses like the one in question. The cancellation in such case only takes place on notice and return of the premium for the unexpired term. *Van Valkenburgh v. Lenox Fire Ins. Co.*, 51 N. Y. 465; Wood on Fire Ins., § 106.

The privilege reserved by the company to terminate the policy on notice cannot be exercised under the circumstances which would make it operate as a fraud on the insured, as in case of notice given pending an approaching conflagration, threatening to destroy the property insured. *Home Ins. Co. v. Heck*, 65 Ill. 111.

In the present case no premium had been paid. The notice was given in good faith. There was no special emergency at the time. It was given during business hours, in ordinary course.

The contract provides that it should be terminated on notice. We perceive no reason why the contract should not be construed according to its terms. The parties might have provided that the risk should be carried by the company after notice for a reasonable time, to enable the insured to place it elsewhere. But they did not do so, and even if a custom of that kind had been proved, which was not, it would have been inadmissible to change or extend the explicit language of the contract. We think the cancellation was effected at the time

of the service of the notice. *Mueller v. South Side Fire Ins. Co.*, 87 Penn. St. 399; *Grace v. Am. C. Ins. Co.*, 109 U. S. 278.

Judgment reversed.

UNITED STATES SUPREME COURT, 1872.

MERCHANTS' MUTUAL INS. CO. v. LYMAN.

(15 Wall. 664.)

All antecedent negotiations become merged in the policy at the time of the contract.

Lyman & Co. brought their action in the court below against the Merchants' Mutual Insurance Company of New Orleans, for the sum of \$12,000, the value of the brig *Sailor Boy*, lost at sea on the 8th of January, 1870, and which was insured, as they allege, by the said company. Their petition set forth, that on the 30th of October, 1869, the company had issued a policy to them on the brig for the sum named, which insured her until January 1, 1870.

That on the 15th December, 1869, they applied to the company to insure them in the same sum, upon the same vessel, for three months from the said 1st January, 1870.

That, after taking time to consider, the company, on December 24, 1869, proposed to renew the insurance for the premium of \$600, and that on December 31, the plaintiffs accepted this proposition for renewal, and that the company on that day agreed with them that it would issue the policy, and make it out and send it to them, and receive the premium.

That on the 15th January, 1870, the plaintiffs sent for the policy and paid the premium, and the company issued to plaintiffs the policy annexed to the petition; that the said policy was but a compliance with and a formal statement of the agreement to renew the insurance, made December 31, 1869.

That on the 8th of January, 1870, the brig was lost, etc.

Along with their petition, the plaintiffs filed two policies of insurance, on their face such as above stated; that is to say, one dated October 30, 1869, for two months, expiring January 1, 1870, and one dated January 15, 1870, and which, by its terms, purported to make an insurance "from the 1st of January, 1870, to the 1st of April, 1870."

On the trial it appeared that the plaintiffs, when they renewed the policy of the 15th January, and paid the premium for insurance, knew that the vessel was lost, and that the defendants had no such knowledge or information.

As on this state of facts it would be obvious that no action could be sustained on the *policy*—and indeed that, in point of fact, the taking of such a policy, and causing the defendant to sign it, would have been a fraud—the plaintiffs framed their petition on the assumption, and directed their evidence to the showing that the execution of the policy was but carrying into effect an agreement made before the loss of the vessel.

In order to sustain this their case they offered in evidence the deposition of their agent, which gave an account of conversations had by him in reference to a renewal of the insurance with some one in the defendants' office. The defendants objected to this testimony, on the ground that there was a written application for and contract of insurance between the parties for the same amount of insurance and same amount of premium, on the same object insured, the vessel called *Sailor Boy*, by the same plaintiffs as insured, and same defendants as insurers, for the same space of time, to wit, from the 1st day of January, 1870, to the 31st March, 1870; that the plaintiffs had no right to contradict the written application aforesaid by proof of a previous verbal contract; that the plaintiffs' right of action, if any, was on the written application and contract aforesaid, and that they could not ignore the said written contract to fall back on an alleged previous verbal contract of the same tenor and purport; that the evidence showing that when the said written contract was executed, the plaintiffs and their agents were aware of the fact of the previous loss and abandonment of the *Sailor Boy*, the said written application and policy were not binding in law, but were nevertheless the contract of the parties subject to be gainsaid by proper allegations and proof of fraud; that the plaintiffs could not ignore the written contract.

But the court ruled as follows :

“The plaintiffs put their entire case upon a verbal contract, to renew the insurance made, as they allege, on the 31st day of December, eight days before the loss. They admit that

when they sent for the written policy, on the 15th of January, they knew of the loss, and that they could not recover on the written policy standing by itself, but they say that the real contract was made on the 31st of December, and that they had a right to go to the jury on that issue."

The court accordingly overruled the objection and admitted the testimony. A verdict was given, and judgment entered for the plaintiffs, for the sum insured, and interest.

The case being now here on error.

Mr. Justice MILLER delivered the opinion of the court.

Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved and become the foundation of a recovery as in all other cases where contracts may be made either by parol or in writing. But it is also true that when there is a written contract of insurance it must have the same effect as the adopted mode of expressing what the contract is, that it has in other classes of contract, and must have the same effect in excluding parol testimony in its application to it, that other written instruments have.

Counsel for the defendants in error here, relies on two propositions, namely, that the policy, though executed January 5th, is really but the expression of a verbal contract, made the 31st day of December previous, and that the loss of the vessel between those two dates does not invalidate the contract, though known to the insured and kept secret from the insurers; and secondly, that they can abandon the written contract altogether and recover on the parol contract.

We do not think that either of these propositions is sound.

Whatever may have been the precise facts concerning the negotiations for a renewal of the insurance previous to the execution of the policy, they evidently had reference to a written contract, to be made by the company.

When the company came to make this instrument, they were entitled to the information which the plaintiffs had of the loss of the vessel. If then they had made the policy, it would have bound them, and no question would have been raised of the validity of the instrument or of fraud practiced by the insured.

On the other hand, if they had refused to make a policy, no injury would have been done to the plaintiffs, and they would then have stood on their parol contract if they had one, and did not need a policy procured by fraudulent concealment of a material fact at the time it was executed and the premium paid.

To permit the plaintiffs, therefore, to prove by parol that the contract of insurance was actually made before the loss occurred, though executed and delivered and paid for afterward, is to contradict and vary the terms of the policy in a matter material to the contract, which we understand to be opposed to the rule on that subject in the law of Louisiana as well as at the common law.

We think it equally clear, that the terms of the contract having been reduced to writing, signed by one party and accepted by the other at the time the premium of insurance was paid, neither party can abandon that instrument, as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose. The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement. And it is hardly necessary to say, that the party who has destroyed the validity of that contract by his own fraud, cannot for *that reason* treat it as if it had never been made, and recover on the verbal statements made before its execution.

Judgment reversed, with directions to grant a new trial.

NEW YORK COURT OF APPEALS, 1860.

HARPER v. NEW YORK CITY INS. CO.

(23 N. Y. 441.)

The written portion of the policy prevails over the general printed form.

This was an action upon a policy of insurance, dated the 3d March, 1853, whereby the defendant insured the plaintiffs against loss by fire, to the amount of \$10,000, on their printing and book materials, stock, paper, stereotype plates, fixtures, printed books, and steam-engine, contained in certain brick build-

ings particularly described, with the privilege "for a printing-office, bindery, book-store, and steam-boiler in the yard." The printed conditions of the policy contained the usual clause, that the company should not be liable for any loss or damage by fire "occasioned by camphene or other inflammable liquid."

It was shown on the trial, that the fire, by which the plaintiffs' premises were totally destroyed, was occasioned by the accidental igniting of a quantity of camphene, kept for cleaning the rollers used for fine printing; and that such use was not merely advantageous, but absolutely necessary in a printing-office.

There was a verdict for the plaintiffs, subject to the opinion of the court, and judgment having been entered thereon, at the General Term, the defendant took this appeal.

COMSTOCK, C. J.—The jury found, in answer to interrogatories specially submitted to them, that the use of camphene in the manner proved was according to a general and established usage in the printing and book business as carried on by the plaintiffs, and that such use was necessary in that business. In the written part of the policy, the subject of insurance is described as the plaintiffs' printing and book materials; stock, etc., "*privileged for a printing office, bindery,*" etc. The language is identical with that contained in the policy which was before us in the case of *Harper v. Albany Insurance Company*, 17 N. Y. 194. We there held, for reasons which need not be repeated, that the insurers were liable for loss occasioned by the necessary and customary use of camphene in the plaintiffs' business, although the use of that article was prohibited, in general terms, in the printed conditions annexed to and forming a part of the contract. In that case, the printed form of the policy, if construed without reference to the subject of insurance as described in the written part, proscribed the use or presence of camphene for any purpose. In this case, the printed condition declares, in substance, that if the article is used, and a loss is occasioned thereby, the insurer will not be liable. There is no other distinction between the two cases.

And this distinction is not one of principle. In the case cited, we found no irreconcilable repugnancy between the written and printed clauses of the contract. If such a repug-

nancy had been discovered, then, as the court said, the printed form must yield to the more careful and deliberate written language of the parties in describing the subject of insurance, at the very moment when the policy was issued. But it was considered, that each clause might take effect; by insuring the plaintiffs' stock, with the privilege of a printing-office and book-bindery, the use of such materials, including camphene, as were necessary in that business was allowed; otherwise, the contract was a mere delusion. But the restraining clause might, nevertheless, have its full effect upon the use of camphene for the purposes of light, and for all purposes beyond its necessary connection with the stock and business insured. So, in this case, camphene must be considered as a part of the stock insured; its continued presence and use were allowed, because the business which required its use was expressly privileged. The printed condition, exempting the underwriters from loss when occasioned by this article, should therefore be construed as referring to uses not within the privilege thus granted; otherwise, the two parts of the contract are repugnant to each other, and the printed form must yield to the deliberate written expression. An insurance upon the plaintiffs' stock and business, to be of no effect if a loss should be occasioned by the combustion of an article constituting a part of that stock, and necessarily used in the business, would, I think, be an anomalous undertaking. Undoubtedly, such a contract might be made: a policy can be so framed as to allow the presence of a dangerous article, and even so as to insure its value, while at the same time it might exempt the insurer from loss, if occasioned by the presence or use of the article; but I think it would need very great precision of language to express such an intention. Where camphene or any hazardous fluid is insured, and its use is plainly admitted, the dangers arising from that source are so obviously within the risk undertaken, that effect should be given to the policy accordingly, unless a different intention is very plainly declared. And such an intention, instead of being hid away in printed forms, remote from the principal contract, ought to be found in the deliberate expressions which are made use of at the time when the contract is entered into.

Without doubt, all the printed conditions and specifications

annexed to a policy are, or at least may be, a part of it. But they relate to insurance in general, as practiced by the underwriter; and upon, or within, those forms, the parties to each policy actually issued write their own particular intention. The plain meaning of the written part should, therefore, prevail, and other clauses must yield; if repugnant, or they must be construed so as to avoid a conflict of intention. In this case, I think the perils of keeping and using camphene were insured against, so far as the keeping or use of it was permitted at all, and that the clause which exempts the insurer from liability should be understood as applying to the presence of the article under other conditions. The judgment should be affirmed.

SELDEN, J. (*dissenting*).—Contracts which belong to an extensive class, such as charter-parties, policies of insurance, etc., where all are in their main features identical, are usually reduced to a prescribed *formula*, embracing those general provisions which are applicable to most cases of the class, and then printed, leaving blank spaces to be filled up in writing, so as to adapt the contract to the particular case. In construing such contracts, if there is any repugnancy between the written and the printed portions, the latter is to be modified and controlled by the former. In other words, those general provisions which were framed for the class at large must yield to such as are more specific, and designed for the particular case.

This rule, which was applied in *Harper v. Albany Mutual Insurance Company*, 17 N. Y. 194, and *Bryant v. Poughkeepsie Mutual Insurance Company*, id. 200, is equally applicable here. That portion of the printed conditions incorporated into the policy which related to the various articles and kinds of business denominated hazardous and extra hazardous, and those which are subjected to special rates of insurance, virtually prohibited the use of camphene upon the insured premises. But the written portion insured the plaintiffs upon their printing-office, bindery, and book-store, and upon the materials, stock, and machinery therein; and as it appeared that camphene constituted a necessary portion of such stock, and was essential to the carrying on of the business insured, its use was

clearly authorized by this clause of the policy. There was, therefore, a direct conflict between the general provisions contained in the printed conditions of the policy and the written description of the particular subject of insurance; and, of course, the latter must prevail. The use of camphene, therefore, was authorized, and it was itself insured as a part of the plaintiffs' stock.

Thus far there is no controversy between the parties, but the contest arises under another clause of the policy. The eighth condition provides, that the company "will not be liable for loss or damage caused by lightning, except that which results from fire that may ensue therefrom; nor for any loss, either by fire or otherwise, occasioned by the explosion of a steam-boiler; or *occasioned by camphene or other inflammable liquid*, or by the explosion of gunpowder." The position of the defendants is, that the loss, as shown by the proofs, was "occasioned by camphene," and hence they are not responsible. It becomes necessary, therefore, to put a construction upon that condition of the policy which I have just recited.

The counsel for the plaintiffs contends that this provision was only intended to exempt the company from liability for any loss which should be occasioned by camphene "in a relation or use *outside* of the description and privilege" contained in the policy. But there are serious difficulties in the way of such a construction; it is an entire departure from the language of the provision, which is broad and general, embracing every loss which should be in any way occasioned by camphene. To make this interpretation compatible at all with the terms of the provision, it is necessary to interpolate a clause more extensive than the entire provision as it stands. The policy says the insurers will not be liable for any loss "occasioned by camphene." This is said to mean, that they will not be liable for such a loss, provided the camphene which caused the loss was outside the insured premises, or was used upon such premises in a manner not authorized by the policy. I know of no rule for the interpretation of contracts which warrants so extensive an interpolation; it would make a contract widely different from that which would result from the terms used by the parties themselves.

The argument in favor of this interpretation is, that, by

force of the rule that the written is to prevail over the printed portion of the policy, the defendants have not only authorized the use of camphene by the plaintiffs for certain purposes, but have consented to include camphene itself as a part of the plaintiffs' stock, among the articles insured; and that it cannot be supposed that they intended to exempt themselves from liability for a loss which should be occasioned by one of the insured articles, and which was upon the premises under the precise circumstances authorized by the policy.

The incongruity suggested by this argument is hardly sufficient to prevent our construing this contract as the parties have made it. What repugnance is there between the provision which authorizes the use of camphene in the business of the insured, and that which exempts the company from liability for a loss "occasioned by camphene"? I can see none whatever. By the written portion of the policy, the insurers assumed a responsibility in regard to the use of camphene, from which they were entirely exempted by the printed conditions relating to hazardous and extra-hazardous business; the eighth condition comes in as a modification of this responsibility. It operates as a division and mutual distribution between the insurers and the assured of the risks resulting from the use of this hazardous article. By the two provisions combined, the insurers say to the assured, we will agree that the mere presence of camphene upon the insured premises, or its use there in your business, shall not vitiate the policy; but if it shall be the actual primary cause of any loss, we will not be held responsible. Such an arrangement is not open to any legal objection, but one which the parties had a perfect right to make, and which seems to me not unnatural. It does not cast the entire risk upon either of the parties, but divides it between them. If a fire occurs from some other cause, and, in consequence of the presence of camphene upon the premises, it is aggravated and made more destructive than it otherwise would have been, the loss falls upon the insurers. If a fire is occasioned by the camphene, and the insurers are not able to trace it to that cause, the loss falls upon them. It is only in those cases where the insurers are able to show that camphene was the original cause of the loss, that the risk is assumed by the assured. I see nothing, either in law or in reason, against the making of such a contract; and that is

precisely the contract which these parties have made, if we interpret their language according to its natural import.

DENIO and CLERKE, JJ., also dissented.

Judgment affirmed.

NEW YORK COURT OF APPEALS, 1883.

WINNE v. NIAGARA FIRE INS. CO.

(91 N. Y. 185.)

Forfeitures are not favored.

Appeal from order of General Term of Supreme Court entered upon an order which affirmed a judgment in favor of plaintiffs, entered upon a verdict.

For six or seven years previous to July, 1876, the defendant, the Niagara Insurance Company, by William H. Fredenburgh, its agent, had insured the Eagle Hotel property belonging to plaintiff, Henry W. Winne, by a policy for \$2,000, loss, if any, payable to Benjamin J. Winne, mortgagee, his co-plaintiff.

About the time of the expiration of the policy, July, 1876, the defendant, the insurance company, mailed Fredenburgh, their agent, a paper which contained opposite Winne's name the word "drop."

Fredenburgh, the agent, told plaintiff that he had got a letter from the company that they wouldn't carry as large an amount as \$2,000, and showed him the paper or letter, explaining the meaning and contents. Fredenburgh then said that the Niagara would carry the policy for \$1,000, and afterwards agreed to issue a policy for that amount, and did write it; but before its delivery, and the next day after it was agreed to be written, the hotel burned. Fredenburgh had been accustomed to give Winne credit for premiums, and hold policies till called for.

The company refused to pay the loss on the ground that the agent had no authority whatever to insure plaintiff's hotel for any amount.

ANDREWS, Ch. J.—The jury found that there was an unconditional agreement on the part of Fredenburgh to reinsure to

the amount of \$1,000, and the claim of the defendant that there was no completed contract of insurance rests upon the fact that the rate of premium and the duration of the risk were not specified when the agreement was made. There can be no doubt that these are essential elements of a contract of insurance, and if there was no meeting of minds of the parties upon these particulars, the contract of insurance was not consummated, and the matter stood as a mere negotiation, incomplete, and imposing no obligation upon either party. The claim that there was no *consensus* of the parties upon these points rests upon the fact that no words passed between them in respect to the time or rate of insurance when the alleged contract was made. But this was unnecessary, provided the jury were authorized, from the circumstances of the transaction, to infer that the parties intended that the new policy should be issued for the same time and at the same rate of premium as the policy which had just expired. There was an express agreement as to the subject-matter of the insurance, the parties, the risk, and the amount. The negotiation referred to a new insurance for \$1,000 on the same building insured by the previous policy, and in the same company. In the absence of negative words, it is a reasonable inference that the parties also understood that the new insurance was to be for the same time and at the same rate of premium as the prior one, differing only in amount. The policy prepared by the agent after the negotiation for the new policy specified the same rate of premium as the prior one, and was for the usual time of one year. We think the jury were authorized to find that the minds of the parties met as to all the essential terms of the contract, and that there was a completed contract of insurance between Fredenburgh and the plaintiff Henry W. Winne.

The remaining question on the merits arises upon the defendant's claim that Fredenburgh had no authority to insure the Eagle Hotel property, and that this was known to Winne when the alleged contract was made. It is admitted that Fredenburgh was the general agent of the defendant at Kingston at the time of the transaction. He was intrusted with blank forms of policies of the defendant, signed by its officers, and was authorized to bind the company by his contracts in the first instance, the company reserving the right to cancel policies

issued by him, and terminate the risk. Under this general authority, Fredenburgh had insured the Eagle Hotel property in the defendant's company for several years, to the amount of \$2,000, the last policy for that amount expiring July 1, 1876. The alleged limitation of his authority to insure the Eagle Hotel property is contained in a paper called an "expiration sheet," sent by the company to Fredenburgh, according to its usual custom, showing the policies which would expire during the month ensuing that in which it was sent, and containing notations opposite each risk. The particular sheet now in question was sent in June, 1876, and contained a list of seven policies, issued at his agency, which would expire in July. Opposite the policy on the Eagle Hotel property was the word "drop," and opposite the others the word "renew." Whether this expiration sheet was seen by Winne before he made the agreement with Fredenburgh for the policy now in question, was a subject of controversy on the trial. But assuming that it was exhibited to and read by Winne before that time, so that he is chargeable with notice of its contents, we are nevertheless of opinion that the language used was not equivalent to an absolute instruction to Fredenburgh not to insure the Eagle Hotel property for any amount, and that an insurance of the property by him for a smaller sum was not prohibited.

The evidence tends to show, and the jury have found that the agent so interpreted the instruction. The prior policy was in fact dropped. The risk was reduced in amount. The agent prepared the new policy, directed it to be reported to the company, and it was entered by the clerk in the register of completed contracts. The word "drop" in the expiration sheet, to say the least, was ambiguous and equivocal, and the principle applies that a letter of instruction from a principal to an agent should be expressed in clear language, and that if not expressed in "plain and unequivocal terms, but the language is fairly susceptible of different interpretations, and the agent in fact is misled and adopts and follows one, while the principal intended another, then the principal will be bound, and the agent will be exonerated." Story on Agency, § 74. See, also, *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 188; 37 Am. Rep. 488. In the absence of special limitation, the authority of Fredenburgh to make the contract in question is unquestionable. The limita-

tion proved, simply prohibited the renewal of the existing risk, or an equivalent insurance. Winne had a right to put this interpretation upon the instruction. If the company intended to decline any insurance on the property, it should have said so. It cannot in justice defeat the contract in question by putting an interpretation upon its instructions at variance with that of its agent and Winne, and of which the language was clearly capable.

The remaining question is whether a joint action lies in favor of the plaintiffs. The plaintiff Henry W. Winne was the owner of the property insured, and the plaintiff Benjamin J. Winne was the mortgagee. The policy contains the clause; "loss, if any, payable to Benjamin J. Winne, to the extent of his mortgage interest therein." We think a joint action is proper. The plaintiffs have a common interest in enforcing the contract. The plaintiff Henry W. Winne has no adverse interest to that of his co-plaintiff. The fund is applicable, first upon the mortgage debt, and when that is paid, the balance belongs to the mortgagor. It is, we think, quite appropriate, and in accord with the flexible rule of procedure now applied to courts of justice, to allow persons situated as are the plaintiffs to unite in maintaining the action, and the practice is sanctioned by the language of the code, and of adjudged cases. Code, § 466; *Boynton v. Clinton; etc., Ins. Co.*, 16 Barb. 254; *Ennis v. Harmony F. Ins. Co.*, 3 Bosw. 516; *Lasher v. Northwestern Ins. Co.*, 18 Hun, 101.

We find no error in the record, and the judgment should therefore be affirmed.

All concur.

Judgment affirmed.

CHAPTER IV.

GENERAL PRINCIPLES.

Representations and Concealments.

UNITED STATES SUPREME COURT, 1886.

PHŒNIX LIFE INS. CO. v. RADDIN.¹

(120 U. S. 183.)

Representations ; concealments.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action brought by Sewell Raddin, and prosecuted by his administrator, upon a policy of life insurance, dated April 25, 1872, the material parts of which were as follows :

"This policy of insurance witnesseth, that the Phoenix Mutual Life Insurance Company of Hartford, Conn., in consideration of the representations made to them in the application for this policy, and of the sum of," etc., "do assure the life of Charles E. Raddin, of Lynn, in the county of Essex, State of Massachusetts, in the amount of ten thousand dollars, for the term of his natural life."

"This policy is issued and accepted by the assured upon the following express conditions and agreements ;" namely, among others, that "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, this policy shall be null and void."

The application was signed by Sewell Raddin, both for his son and for himself, and contained twenty-nine printed "ques-

¹ As to whether application forms part of the contract, compare *Cushman v. U. S. Life Ins. Co.*, 63 N. Y. 404.

tions to be answered by the person whose life is proposed to be insured, and which form the basis of the contract," two of which, with the written answers to them, and the concluding paragraph of the application, were as follows :

"28. Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts \$10,000, Equitable Life As- are now assured on the life of surance Society. the party, and in what companies? If already assured in this company, state the number of policy.

"29. Is the party and the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to the health, habits, or circumstances of the party to be assured, will vitiate the policy, and forfeit all payments thereon? Yes.

"It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that this application shall form the basis of the contract for insurance, which contract shall be completed only by delivery of policy, and that any untrue or fraudulent answers, any suppression of facts," etc., "shall and will render the policy null and void, and forfeit all payments made thereon."

It was admitted at the trial, that Charles E. Raddin died July 18, 1881; and that at the date of this policy he had an endowment policy in the Equitable Life Assurance Society for \$10,000, which was afterwards paid to him.

One of the defenses relied on at the trial was that the answer to question 28 in the application was untrue, and that there was a fraudulent suppression of facts material to the insurance, because the plaintiff, by his answer to that question,

"\$10,000, Equitable Life Assurance Society," intended to have the defendant understand that the only application which had been made to any other company for assurance upon the life of his son was one made to the Equitable Life Assurance Society, upon which that society had issued a policy of \$10,000; whereas in fact the plaintiff, within three weeks before the application for the policy in suit, had made applications to that society and to the New York Life Insurance Company for additional insurance upon the son's life, each of which had been declined.

The defendant offered to prove that the two other applications were made and declined as alleged, and that the facts as to the making and the rejection of both those applications were known to the plaintiff, and intentionally concealed by him, at the time of his application to the defendant; and upon these offers of proof asked the court to rule, First, that the answer to question 28 was untrue, and therefore no recovery could be had on this policy; second, that there was a suppression of facts by the plaintiff, and therefore he could not recover; and, third, "that the answer to question 28 must be construed to be an answer to all the clauses of that question, and as such was misleading, and amounted to a concealment of facts which the defendant was entitled to know and the plaintiff was bound to communicate."

But the court excluded all the evidence so offered, declined to give any of the rulings asked for, and ruled "that if the answer to one of the interrogatories of question 28 was true, there would be no breach of the warranty; that the failure to answer the other interrogatories of question 28 was no breach of the contract; and that if the company took the defective application, it would be a waiver on their part of the answers to the other interrogatories of that question."

The jury having returned a verdict for the plaintiff in the full amount of the policy, the defendant's exceptions to the refusal to rule as requested and to the rulings aforesaid present the principal question in the case.

The rules of law which govern the decision of this question are well settled, and the only difficulty is in applying those rules to the facts before us.

Answers to questions propounded by the insurers in an

application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant. *Moulor v. American Ins. Co.*, 111 U. S. 335; *Campbell v. New England Ins. Co.*, 98 Mass. 381; *Thomson v. Weems*, 9 App. Cas. 671.

The misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495; *Jeffries v. Life Ins. Co.*, 22 Wall. 47; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Macdonald v. Law Union Ins. Co.*, L. R., 9 Q. B. 328; *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564, and 100 N. Y. 536.

Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application. *Cazenove v. British Equitable Assurance Co.*, 29 Law Journal (N. S.) C. P. 160, affirming *S. C.*, 6 C. B. N. S. 437. But where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial. *Connecticut Ins. Co. v. Luchs*, 108 U. S. 498; *Hall v. People's Ins. Co.*, 6 Gray, 185; *Lorillard Ins. Co. v. McCulloch*, 21 Ohio St. 176; *American Ins. Co. v. Mahone*, 56 Mississippi, 180; *Carson v. Jersey City Ins. Co.*, 14 Vroom, 300, and 15 Vroom, 210; *Lebanon Ins. Co. v. Kepler*, 106 Penn. St. 28.

The distinction between an answer apparently complete, but in fact incomplete and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurers,

may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against fire is asked whether the property is encumbered, and for what amount, and in his answer discloses one mortgage when in fact there are two, the policy issued thereon is avoided. *Towne v. Fitchburg Ins. Co.*, 7 Allen, 51. But if to the same question he merely answers that the property is encumbered, without stating the amount of encumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount. *Nichols v. Fayette Ins. Co.*, 1 Allen, 63.

In the contract before us, the answers in the application are nowhere called warranties, or made part of the contract. In the policy those answers and the concluding paragraph of the application are referred to only as "the declarations or statements upon the faith of which this policy is issued;" and in the concluding paragraph of the application the answers are declared to be "fair and true answers to the foregoing questions," and to "form the basis of the contract for insurance." They must therefore be considered not as warranties which are part of the contract, but as representations collateral to the contract, and on which it is based.

The 28th printed question in the application consists of four successive interrogatories, as follows: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the number of policy." The only answer written opposite this question is "\$10,000, Equitable Life Assurance Society."

The question being printed in very small type, the answer is written in a single line midway of the opposite space, evidently in order to prevent the ends of the letters from extending above or below that space; and its position with regard to that space, and to the several interrogatories combined in the question, does not appear to us to have any bearing upon the construction and effect of the answer.

But the four interrogatories grouped together in one question, and all relating to the subject of other insurance, would naturally be understood as all tending to one object—the ascer-

taining of the amount of such insurance. The answer in its form is responsive, not to the first and second interrogatories, but to the third interrogatory only, and fully and truly answers that interrogatory by stating the existing amount of prior insurance and in what company, and thus renders the fourth interrogatory irrelevant. If the insurers, after being thus truly and fully informed of the amount and the place of prior insurance, considered it material to know whether any unsuccessful applications had been made for additional insurance, they should either have repeated the first two interrogatories, or have put further questions. The legal effect of issuing a policy upon the answer as it stood was to waive their right of requiring further answers as to the particulars mentioned in the 28th question, to determine that it was immaterial, for the purposes of their contract, whether any unsuccessful applications had been made, and to estop them to set up the omission to disclose such applications as a ground for avoiding the policy. The insurers, having thus conclusively elected to treat that omission as immaterial, could not afterwards make it material by proving that it was intentional.

The case of *London Assurance v. Mansel*, 11 Ch. D. 363, on which the insurers relied at the argument, did not arise on a question including several interrogatories as to whether another application had been made, and with what result, and the amount of existing insurance, and in what company. But the application or proposal contained two separate questions—the first, whether a proposal had been made at any other office, and, if so, where; the second, whether it was accepted at the ordinary premium, or at an increased premium, or declined—and contained no third question or interrogatory as to the amount of existing insurance, and in what company. The single answer to both questions was, “Insured now in two offices for £16,000 at ordinary rates. Policies effected last year.” There being no specific interrogatory as to the amount of existing insurance, that answer could apply only to the question whether a proposal had been made, or to the question whether it had been accepted and at what rates, or declined; and as applied to either of those questions it was in fact, but not upon its face, incomplete and therefore untrue. As applied to the first question, it disclosed only some and not all of the

proposals which had in fact been made; and as applied to the second question, it disclosed only the proposals which had been accepted, and not those which had been declined, though the question distinctly embraced both. That case is thus clearly distinguished in its facts from the case at bar. So much of the remarks of Sir George Jessel, M. R., in delivering judgment, as implies that an insurance company is not bound to look with the greatest attention at the answers of an applicant to the great number of questions framed by the company or its agents, and that the intentional omission of the insured to answer a question put to him is a concealment which will avoid a policy issued without further inquiry, can hardly be reconciled with the uniform current of American decisions.

For these reasons, our conclusion upon this branch of the case is that there was no error of which the company had a right to complain, either in the refusals to rule, or in the rulings made.

Judgment affirmed.

COURT OF QUEEN'S BENCH, 1867.

PROUDFOOT v. MONTEFIORE.

(L. R., 2 Q. B. 511.)

Principal responsible for concealment of material facts by his agent.

Declaration against the defendant as chairman of the Alliance Assurance Company, claiming damages from the company in respect of the company not having delivered to the plaintiff a policy of insurance on certain goods shipped on board a ship called the *Anne Duncan*, pursuant to an agreement alleged by the plaintiff to have been entered into between the plaintiff and the company, and in respect of the company not having paid the sum of money which the plaintiff alleged would have become due on such policy if the same had been so delivered.

The third plea stated, in substance, that the alleged agreement was obtained from the company by the wrongful and improper concealment by the plaintiff from the company of certain facts and information which the plaintiff knew as to the ship having run ashore on or about the 23d of January,

1861, which matters so concealed were unknown to the company; that the matters which were so wrongfully and improperly concealed were at the time of the making of the promise material to be known to the company, and material to the risks against which the company made the promise to indemnify the plaintiff.

The cause was tried at the Liverpool summer assizes, 1861, before Crompton, J., when a verdict was found for the plaintiff. On the 27th of June, 1862, a rule for a new trial, obtained at the instance of the defendant, was made absolute. The cause was tried a second time at the Liverpool summer assizes, 1863, before Mellor, J. At the second trial it was agreed that the case should be left to the jury on the question, whether or not the plaintiff, before the instructions were given for the insurance and before it was effected, had actual knowledge of the ship or cargo having been lost, or of any misfortune having happened to, or of anything being amiss with, the ship or cargo, or of the ship or cargo having sustained any injury. The jury found for the plaintiff. A judge's order was made, before the jury returned their verdict, that in the event of the jury finding for the plaintiff, the verdict should be entered for the sum of £1,200, plus interest to the day of signing judgment, less the amount of the premium and salvage, and subject to a special case to be stated from the notes taken by Crompton, J., with the addition of the evidence of Rees taken by Mellor, J., and the letters therein referred to. The court were to draw any inferences of fact they thought proper.

The judgment of the court (Cockburn, C. J., Blackburn and Shee, J. J.) was delivered by

COCKBURN, C. J.—The agreement was for insurance on a cargo of madder, lost or not lost, shipped at Smyrna, on a voyage from Smyrna to Liverpool, on board the ship *Anne Duncan*, for and on account of the plaintiff, and consigned to him by one T. B. Rees, of Smyrna.

The plaintiff, a merchant at Manchester and Liverpool, dealt largely in madders in the Smyrna market, and Rees, being resident at Smyrna, was employed by him at a salary of £800 a year to make purchases of madder on his account, and to ship and consign the cargoes to him. The cargo in question

was purchased and shipped by Rees in the course of his employment as such agent. The ship, with the cargo on board, sailed from Smyrna on the 21st of January, 1861, but again brought up in the Gulf of Smyrna on the same day. She set sail again on the 23d, but was stranded in the course of that day, and became a wreck. The cargo became a total loss. Intelligence of the stranding of the ship was communicated to Rees on the morning of the 24th. On the 26th, which was the first post day, he communicated by letter to the plaintiff the loss of the vessel; and the fact that though the cargo had been got out, yet as the vessel had had twelve feet of water in the hold, the greater part of the cargo would be seriously damaged. Having communicated this information, the letter proceeds thus: "I hope to goodness you are fully insured. On the 12th instant I forwarded you invoice and weights of the shipment by her, which gave you plenty of time to effect insurance. Lloyd's agents have telegraphed the disaster, which will reach London before my letter of the 19th instant, inclosing bill of lading. I did not dare telegraph to you, for when once you had the intelligence in hand you were prevented from insuring." On the 31st of January the plaintiff, after receipt of the letters from Rees of the 12th and 19th of January, but prior to the receipt of that of the 26th, gave instructions to effect the policy, and the slip was signed on the same day by the company's agent at Manchester.

There was, therefore, no fraud or undue concealment by the plaintiff of a material fact within his personal knowledge. On the other hand, it is clear that the fact of the loss of the vessel and damage to the cargo might have been communicated to him by Rees by means of the telegraph, but was purposely kept back by the agent for the fraudulent purpose of enabling the plaintiff to insure. We think it clear, looking to the position of Rees as agent to purchase and ship the cargo for the plaintiff, that it was his duty to communicate to his principal the disaster which had happened to the cargo; and, looking to the now general use of the electric telegraph in matters of mercantile interest, between agents and their employers, we think it was the duty of the agent to communicate with his employers by this speedier means of communication. From the letter of the agent it appears that, but for the fraudulent

motive for his silence, he would, in the ordinary course of his duty, have conveyed the intelligence of the loss to his employer, and would have availed himself of the telegraph for that purpose.

Upon the above facts, the question arises whether the plaintiff, the assured, is so far affected by the knowledge of his agent of the loss of the vessel and damage to the cargo as that the fraud thus committed on the underwriter, through the intentional concealment of the agent, though innocently committed so far as the plaintiff is concerned, will afford a defense to the underwriter on a claim to enforce the policy.

Two cases decided in this court, one in the time of Lord Mansfield, the other in that of Lord Ellenborough, establish the affirmative of this proposition. In the case of *Fitzherbert v. Mather*, 1 T. R. 12, where an agent of the assured was employed to ship a cargo of oats, and to communicate the shipment to another agent who was employed to effect an assurance, an omission on the part of the former, who had written to announce the sailing of the ship, on the ship having afterwards got on shore, to communicate that fact, which he might have done by the same post, was held fatal to the insurance. Ashurst, J., observes: "On general principles of policy, the act of the agent ought to bind the principal; because it must be taken for granted that the principal knows whatever the agent knows. And there is no hardship on the plaintiff: for if the fact had been known the policy could not have been effected." Buller, J., says: "Though the plaintiff be innocent, yet if he build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer. It is the common question every day at Guildhall, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit. Here it appears that the plaintiff trusted Thomas (the agent), and he must therefore take the consequences."

In the case of *Gladstone v. King*, 1 M. & S. 35, which was an action on a policy on a ship, "lost or not lost," the master had omitted to communicate, when writing to his owners, the fact of the ship having been driven on a rock, a fact as to which, on arriving at the port of discharge, he made a protest, detailing the accident, and stating that the ship's bottom must

have been chafed ; and the owners, in ignorance of the accident, had effected an insurance. On these facts it was held that the captain was bound to communicate the fact, and, for want of such communication, the antecedent damage was an implied exception from the insurance, and the plaintiffs could not recover the loss arising from the repairs rendered necessary by the accident. "If," says Lord Ellenborough, "the captain might be permitted to wink at these circumstances without hazard to the owners, the latter would in all such cases instruct their captain to remain silent ; by which means the underwriter at the time of subscribing the policy would incur a certainty of being liable for an antecedent average loss. To prevent such a consequence, and considering that what is known to the agent is impliedly known to the principal, and that the captain knew, and might have actually communicated to the plaintiffs, the cause of damage, so as to have apprised them of it before the time of effecting the policy, I think that no mischief will ensue from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience ; and there being no fraud imputed to the captain in the concealment will not alter the case."

An eminent authority, the late Mr. Justice Story, has, however, declined to be bound by these decisions. In a case, *Ruggles v. General Interest Ins. Co.*, 4 Mason, 74, tried before him on a policy of insurance effected after a total loss, where the master had omitted to give intelligence of the loss to his owner with the fraudulent design of enabling him to make an insurance, and the insurance had been effected by the owner in ignorance of the loss, that learned judge held, that, as the owner at the time of procuring the insurance had no knowledge of the loss, but acted with an entire good faith, he was not precluded from recovering, and that the policy was not rendered void by the omission of the master to communicate intelligence of the loss, although such omission was willful and fraudulent. The case being taken to a court of error (12 Wheat. 408), the latter upheld the decision ; not, indeed, on the grounds taken by Mr. Justice Story, but on the very unsatisfactory, and, as we think, untenable ground, that by the total loss of the vessel the master had wholly ceased to be the agent of the owner, and had become

the agent of the underwriters. From the language of the judgment it may be inferred that if the court had considered that the relation of the master to his owners had not been interrupted by the loss of the vessel they would not have upheld the decision appealed from. The ruling of Mr. Justice Story has been discussed by Mr. Duer, in his admirable work on insurance (vol. ii. p. 418), and we think the reasoning of the learned writer fully establishes his conclusion as to the ruling having been erroneous. Notwithstanding the dissent of so eminent a jurist as Mr. Justice Story, we are of opinion that the cases of *Fitzherbert v. Mather* and *Gladstone v. King* were well decided; and that if an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or, in the ordinary course of business, ought to have knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance fails to disclose it.

It has been said, indeed, that a party desiring to insure is entitled, on paying a corresponding premium, to insure on the terms of receiving a compensation in the event of the subject-matter of the insurance being lost at the time of the insurance, and that he ought not to be deprived of the advantage, which he has paid to secure, by the misconduct of his agent. But to this there are two answers: First, that, as we have already pointed out, the implied condition on which the underwriter undertakes to insure—not only that every material fact which is, but also that every fact which ought to be, in the knowledge

of the assured, shall be made known to him—is not fulfilled; secondly, as was said by the court in *Fitzherbert v. Mather*, where a loss must fall on one of two innocent parties through the fraud or negligence of a third, it ought to be borne by the party by whom the person guilty of the fraud or negligence has been trusted or employed.

By thus holding, we shall prevent the tendency to fraudulent concealment on the part of masters of vessels and agents at a distance in matters on which they ought to communicate information to their principals, as also any tendency on the part of principals to encourage their servants and agents so to act. For these reasons our judgment must be for the defendant.

Judgment for the defendant.

HOUSE OF LORDS, 1887.

BLACKBURN v. VIGORS.

(L. R., 12 App. Cas. 531.)

Concealment of material facts by agents. What agents may bind the principal by failure to disclose to insurers material facts.

Appeal from the Court of Appeal.

The appellants, Blackburn, Low & Co., having brought an action against the respondent, Thomas Vigors, under a policy of reinsurance subscribed by him for £50, claiming for a total loss by perils of the sea, the substantial defense was that the defendant was induced to subscribe the policy by the wrongful concealment by the plaintiffs and their agents of certain material facts known to the plaintiffs or their agents, and unknown to the defendant.

The plaintiffs, underwriters and insurance brokers at Glasgow, had underwritten the steamship *State of Florida* for £1,500, the policy having been effected by the usual brokers for the ship, Rose, Murison & Thomson, who were underwriters and insurance brokers in Glasgow. The ship had left New York on the 11th of April, 1884, bound for Glasgow, where she was due about the 24th or 25th. On the 30th the plaintiffs tried to reinsure through their London brokers, Roxburgh, Currie & Co., but the terms asked were higher than the plaintiffs would give. On the next day, May 1, the plaintiffs asked Rose,

Murison & Thomson to effect a reinsurance for £1,500, at fifteen guineas, through Rose, Thomson, Young & Co., the London agents of Rose, Murison & Thomson. The latter telegraphed accordingly to Rose, Thomson, Young & Co. After the telegram, and before any answer came, Murison, a member of the firm of Rose, Murison & Thomson, became aware of certain facts concerning the ship which were material to the risk, but these facts were never communicated to the plaintiffs or to Roxburgh, Currie & Co. After learning these facts, Rose, Murison & Thomson received the following answer to their telegram: "Twenty guineas paying freely, and 'market very stiff; likely to advance before day is out.'" This answer they showed to the plaintiffs, and then sent, in the plaintiffs' names, the following telegram to Rose, Thomson, Young & Co.: "Pay twenty guineas." The answer to this was sent direct to the plaintiffs, who ultimately reinsured for £800, at twenty-five guineas, through Rose, Thomson, Young & Co. This was not the policy sued on.

On the 2d of May the plaintiffs, through Roxburgh, Currie & Co., effected a policy of reinsurance for £700, at thirty guineas, lost or not lost. This was the policy sued on. The ship had, in fact, been lost some days before the plaintiffs tried to reinsure. It was admitted that the plaintiffs and Roxburgh, Currie & Co. acted in good faith throughout.

The jury having been discharged by consent, Day, J., gave judgment for the plaintiffs for the amount claimed.

The Court of Appeal (Lindley and Lopes, L.JJ., Lord Esher, M. R., dissenting) reversed this decision and gave judgment for the defendant.

Against this judgment the plaintiffs appealed.

LORD HALSBURY, L. C.—My Lords, in this case the plaintiffs sue upon a policy of marine insurance, and the only question arises upon a statement of defense, that the defendant was induced to enter into the contract by concealment of material facts by the plaintiffs and their agents.

The facts are not in dispute. Neither the plaintiffs nor the agent through whom the policy was effected had any knowledge of the material fact, the concealment or non-disclosure of which is relied on as vitiating the policy; but an agent who

did not effect the policy, at an earlier period, received information, admitted to be material, while he was acting as agent to effect an insurance for the plaintiffs, which he did not communicate.

So far as I can understand the judgment of the Court of Appeal, it is intended to lay down a principle that would not, I think, be contested, but it applies that principle to a state of facts to which, I think, it is inapplicable. Lindley, L. J., says, I think correctly: "It is a condition of the contract, that there is no misrepresentation or concealment, either by the assured or by any one who ought, as a matter of business and fair dealing, to have stated or disclosed the facts to him or to *the* underwriter for him." And Lopes, L. J., after stating the principle upon which the knowledge of the agent is the knowledge of the principal, explains it to mean, that the principal is to be as responsible for any knowledge of a material fact acquired by his agent employed to obtain the insurance, as if he had acquired it himself. To the propositions thus stated, I think no objection could be made; but it is obvious that the words in the one judgment "agent employed to obtain the insurance," or in the other judgment, the words "*the* underwriter," import that the particular contract obtained was, in the language of the statement of defense, a policy which the defendant was induced to subscribe by the wrongful concealment by the plaintiffs and their agents of certain facts then known to the plaintiffs or their agents, and unknown to the defendant, and which were material to the risk.

I doubt very much whether the solution of the controversy as to what is the true principle upon which the contract of insurance is avoided by concealment or misrepresentation, whether by considering it fraudulent or as an implied term of the contract, helps one very much in deciding the present case. If one were to adopt in terms the language of Lord Ellenborough in *Gladstone v. King*, 1 M. & S. 35, I do not think it could justify the judgment of the majority of the Court of Appeal. In that case, a policy lost or not lost was effected on the 25th of October. On the previous 25th of July the ship had run upon a rock. On the 5th of August the captain wrote to his owners, the plaintiffs; they received his letter on the 5th of October. Whatever may be said of the logic of

that case, which acquitted the captain of all ill intention, but decided upon the ground that, otherwise, owners might direct their captains to remain silent, and which, upon a policy lost or not lost, assumes any antecedent damage to have been an implied exception out of the policy, it does not proceed upon any such ground as the Court of Appeal appear to rely on here. Lord Ellenborough says: "No mischief will ensue" (a somewhat strange mode of enunciating a proposition of law) "from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience." Unfortunately his lordship does not state what is the principle which he apparently admits to be new. I can quite understand, that, when a man comes for an insurance upon his ship, he may be expected to know both the then condition and the history of the ship he seeks to insure. If he takes means not to know, so as to be able to make contracts of insurance without the responsibility of knowledge, this is fraud. But even without fraud, such as I think this would be, the owner of the ship cannot escape the necessity of being acquainted with his ship and its history because he has committed to others—his captain, or his general agent for the management of his shipping business—the knowledge which the underwriter has a right to assume the owner possesses when he comes to insure his ship.

With respect to agency so limited, I am not disposed to differ with the proposition laid down by Cockburn, C. J., in *Proudfoot v. Montefiore*, L. R., 2 Q. B. 511. A part of the proposition is "that the insurer is entitled to assume as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge." I think these last are the cardinal words, and contemplate such an agency as I have described above. I am unable, however, to see that the present case is governed by any such principle.

A broker is employed to effect a particular insurance. While so employed he receives material information: he does not effect the insurance, and he does not communicate the information. How is it possible to suggest that the assured could rely upon the communication to the principal of every

piece of information acquired by an agent through whom the assured has unsuccessfully endeavored to procure an insurance? I am unable to accept the criticism by the Master of the Rolls upon the proposition that the knowledge of the agent is the knowledge of the principal. When a person is the agent to know, his knowledge does bind the principal. But in this case I think the agency of the broker had ceased before the policy sued upon was effected. The principal himself, and the broker through whom the policy sued on was effected, were both admitted to be unacquainted with any material fact which was not disclosed. I cannot but think that the somewhat vague use of the word "agent" leads to confusion. Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority, both in fact and in the common understanding of their form of employment, that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received.

In *Fitzherbert v. Mather*, 1 T. R. 12, the consignor and shipper of the goods insured was the agent whose knowledge was in question. In *Gladstone v. King*, *supra*, the master of the ship was the agent; and in *Proudfoot v. Montefiore*, *supra*, the agent was the accepted representative of the principal, in effect trading and acting for him in Smyrna, the owner himself carrying on business in Manchester. And though the decision in *Ruggles v. General Insurance Co.*, 12 Wheat. 408, before the Supreme Court of the United States, may not be satisfactory in what they held, under the circumstances of that case, to be the relation between the captain of the ship and his owners, the principle upon which that case was decided was the supposed termination of the agency between them.

Where the employment of the agent is such that, in respect of the particular matter in question he really does represent the principal, the formula, that the knowledge of the agent is his knowledge, is, I think, correct; but it is obvious that that formula can only be applied when the words "agent" and "principal" are limited in their application.

To lay down as an abstract proposition of law, that every agent, no matter how limited the scope of his agency, would bind every principal, even by his acts, is obviously and upon the face of it absurd; and yet it is by the fallacious use of the word "agent" that plausibility is given to reasoning which requires the assumption of some such proposition.

What, then, is the position of the broker in this case, whose knowledge, though not communicated, is held to be that of the principal?

He certainly is not employed to acquire such knowledge, nor can any insurer suppose that he has knowledge in the ordinary course of employment, like the captain of a ship, or the owner himself, as to the condition or history of the ship. In this particular case the knowledge was acquired not because he was the agent of the assured, but from the accident that he was general agent for another person. The reason why, if he had effected the insurance, his knowledge, unless he communicated it, would have been fatal to the policy, is because his agency was to effect an insurance, and the authority to make the contract drew with it all the necessary powers and responsibilities which are involved in such an employment; but he had no general agency—he had no other authority than the authority to make the particular contract, and his authority ended before the contract sued on was made. When it was made, no relation between him and the ship-owner existed which made or continued him an agent, for whose knowledge his former principal was responsible. There was no material fact known to any agent which was not disclosed at the point of time at which the contract was made; there was no one possessed of knowledge whose duty it was to communicate such knowledge.

For these reasons I am of opinion that the judgment of the Court of Appeal should be reversed, and the judgment of Day, J., restored; and I move your Lordships accordingly.

LORD WATSON.—My Lords, this is a case of considerable nicety; but I have ultimately come to the conclusion, for the reasons already stated by the Lord Chancellor, that the appeal ought to be allowed.

It is, in my opinion, a condition precedent of every contract

of marine insurance, that the insured shall make a full disclosure of all facts materially affecting the risk which are within his personal knowledge at the time when the contract is made. Where an insurance is effected through the medium of an agent, the ordinary rule of law applies; and non-disclosure of material facts, known to the agent only, will affect his principal, and give the insurer good ground for avoiding a contract.

In the case of insurance by a ship-owner, it has been decided that he is affected by the knowledge of a class of agents other than those whom he employs to insure. In the ordinary course of business, the owner of a trading vessel employs a master and ship-agents, whose special function is to keep their employer duly informed of all casualties encountered by his ship, which would materially influence the judgment of an insurer.

On that ground it has been ruled that the insurer must be held to have transacted, in reliance upon the well-known usage of the shipping trade, and that he is consequently entitled to assume that every circumstance material to the risk insured has been communicated to him, which ought in due course to have been made known to the ship-owner before the insurance was affected. Accordingly, if a master or ship-agent, whether willfully or unintentionally, fail in their duty to their employer, their suppression of a material fact will, notwithstanding his ignorance of the fact, vitiate his contract.

I do not think it necessary to notice in detail the authorities which bear on this point. I desire to say, however, that I have difficulty in comprehending the principle upon which the court in *Gladstone v. King*, *supra*, and *Stribley v. Imperial Marine Insurance Company*, 1 Q. B. D. 507, held that the innocent non-communication of a material fact by an agent who was the *alter ego* of the ship-owner merely created an exception from the policy. In both these cases the court appears to me to have undertaken the somewhat perilous task of settling the terms of the contract, which the insurer would have made for himself if the fact had been communicated to him.

In the present case it is sought to extend the imputed knowledge of the insured to all facts which, during the period of his employment, became known to any agent other than the

agent effecting the policy in question, who was employed at any time, successfully or unsuccessfully, to insure the whole or part of the same risk with that covered by the policy. This is a case of reinsurance; but it is obvious that the principle, if admitted, would be equally applicable to the original contract.

I am of opinion, with your Lordships, that the responsibility of an innocent insured for the non-communication of facts which happen to be within the private knowledge of persons whom he merely employs to obtain an insurance upon a particular risk ought not to be carried beyond the person who actually makes the contract on his behalf. There is no authority whatever for enlarging his responsibility beyond that limit, unless it is to be found in the decisions which relate to captains and ship-agents; and these do not appear to me to have any analogy to the case of agents employed to effect a policy. There is a material difference in the relations of these two classes of agents to their employer. The one class is specially employed for the purpose of communicating to him the very facts which the law requires him to divulge to his insurer; the other is employed, not to procure or furnish information concerning the ship, but to effect an insurance. There is also, as the Master of the Rolls pointed out, an important difference in the positions of those two classes with respect to the insurer. He is entitled to contract, and does contract, on the basis that all material facts connected with the vessel insured, known to the agent employed for that purpose, have been by him communicated, in due course, to his principal. So, also, when an agent to insure is brought into contact with an insurer, the latter transacts on the footing that the agent has disclosed every material circumstance within his personal knowledge, whether it be known to his principal or not; but it cannot be reasonably suggested that the insurer relies, to any extent, upon the private information possessed by persons of whose existence he presumably knows nothing.

In the circumstances of this case I have come to the conclusion, that, whilst it might be the moral duty of Mr. Murison to communicate to the appellants the information which he received on the forenoon of the 1st of May, 1884, he was under no legal obligation to do so. There may be circumstances which impose upon agents in the position of Mr. Murison an

express or implied duty to communicate their own information to their principal, but nothing of that sort occurs here. I must, in fairness to Mr. Murison, say that I can find no warrant for the inference of fact drawn by Lindley, L. J., that he purposely omitted to impart his knowledge to the appellants, in order that they might reinsure on more favorable terms. No such imputation was made at the trial; and, if it had been made, it ought to have been submitted to the jury, and their verdict taken upon it.

I concur therefore in the judgment which has been moved.

Order appealed from reversed.

CHAPTER V.

GENERAL PRINCIPLES.

Warranties.

HOUSE OF LORDS, 1884.

THOMSON v. WEEMS.

(L. R., 9 App. Cas. 671.)

Warranty of temperate habits.

LORD WATSON.—This appeal raises two questions of some importance: the one of law, the other of fact. The first of these involves the construction of a policy of assurance, bearing date the 25th of November, 1881, effected by the deceased, William Weems, upon his own life, with the Standard Company, which is represented in this action by the appellant.

On the 9th of November, 1881, the deceased submitted a proposal to the company, which was made the basis of the contract of assurance. The seventh question in the proposal was in these terms: “(1) Are you temperate in your habits? (2) And have you always been strictly so?” And the reply made to it by the deceased was: “(1) Temperate; (2) Yes.” It was set forth in the proposal, and it was also made a condition of the policy, that in the event of the foregoing or any other averments made by the assured in his proposal concerning his age, health, and other particulars proving to be untrue, the policy was to become null and void, and all sums paid by the assured were to be forfeited.

Mr. Weems died on the 29th of July, 1882, and the Standard Company declined to pay the sum assured, on the ground that various statements made by the deceased in his proposal, including his answer to the seventh question, were, in point of fact, untrue. The respondents, who had acquired right to the

policy, thereupon brought an action for recovery of its amount, which was resisted by the appellant upon the same grounds which had previously been assigned by the company for their refusal to pay. The Lord Ordinary (Fraser), after a proof had been given, gave decree for the respondents; and his judgment was, on a reclaiming note, affirmed by three of the learned judges of the second division, Lord Rutherford Clark dissenting.

I entertain no doubt that, according to the law of Scotland, the declaration of the assured taken in connection with the policy itself, in his proposal to the company, constitutes an express warranty that the answer made by him to the seventh question was true. In other words, it is an express and essential condition of the contract, that the policy shall be null and void in the event of the averment by the assured as to his habits, implied in his answer to that question, proving to be false. The doctrine of warranty, as applied to such stipulations in a contract of assurance, is the same in the law of Scotland as in that of England.

Notwithstanding that the warranty is express, there still remains for consideration what must be held to be the subject-matter of the warranty. That is a point to be determined in each case, according to the just construction of the question and answer taken *per se*, and without reference to the warranty given. In the present case, the seventh question proceeds from the company, being printed on a form of proposal issued by them for the use of persons who may be desirous of effecting an assurance. The question must, in my opinion, be interpreted according to the ordinary and natural meaning of the words used, if that meaning be plain and unequivocal, and there be nothing in the context to qualify it. On the other hand, if the words used are ambiguous, they must be construed *contra proferentes*, and in favor of the assured. For my own part, I can discern no ambiguity in the language of question seven. I agree with Lord Rutherford Clark, that "the import of the answer is precisely the same as if the deceased had affirmed: first, that he was temperate in his habits; and, secondly, that he had always been strictly so." In its plain and ordinary sense, that statement is an averment of fact, and not a mere assertion of the opinion or belief entertained by the assured

with regard to the fact. It then appears to me, that, whatever may be the import of the word "temperate" (which is a separate matter), the assured must be held to have warranted, not that the assertion was true according to his sincere conviction, but true in point of fact; and, consequently, that in order to establish a breach of warranty it is not necessary for the appellant to prove that the assertion was morally false.

In the second division the majority of the judges were of opinion that the answer in question was a statement not of fact, but of the personal belief of the assured. Lord Young (in whose opinion Lord Craighill concurred) referred to the views which were expressed by him (as Lord Ordinary) in *Scottish Life Assurance Co. v. Buist*, 4 Court Sess. Cas., 4th series, 1076. In that case the assured had given a warranty very similar to that with which we have to deal, being to the effect that his habits were sober and temperate, and had always been so; and the learned judge in reference to that warranty said: "I mean, however, to express my opinion distinctly to this effect, that an insurance office challenging the policy after the death of the assured, on the ground of untrue answers to queries, and untrue declarations made by him regarding his health and habits of life, undertakes a heavy onus, to the discharge of which it must be strictly held. I do not go the length of saying that gross and willful falsehood must be proved. But, first, the falsehood must be clear, and on a subject which is, or reasonably may be, material to the risk; and second, if not willful, it must be inexcusable in this sense, that it consists in a blamably reckless or careless assertion or omission of which an honest man, giving ordinary attention to the matter in hand, would not have been guilty, and which, in fairness to the office which was deceived, cannot be treated or passed over as immaterial or trifling."

These observations were not necessary to the decision of *Scottish Life Assurance Company v. Buist*, because the learned judge held it to be proved that the statements warranted had been made fraudulently. But his Lordship adopts his dicta in that case as expressing the principles which ought to govern the decision of the present case; and, consistently with these principles, he treats the seventh question as an "appeal to the man himself as to the epithets which he would apply to himself

with respect to his habits," and upon that footing he holds that the answer to it cannot be regarded as false. The Lord Justice Clerk seems to have taken substantially the same view; inasmuch as he states that if he "had thought that the answers given here were not given in good faith," he would have agreed with Lord Rutherford Clark, who was of opinion that the appellant ought to prevail.

I am unable to assent to the principles so clearly enunciated by Lord Young, in *Scottish Life Assurance Company v. Buist*. When the truth of a particular statement has been made the subject of warranty, no question can arise as to its materiality or immateriality to the risk, it being the very purpose of the warranty to exclude all controversy upon that point. As the Lord Chancellor (Cranworth) said in *Anderson v. Fitzgerald*, 4 H. L. 503: "Nothing, therefore, can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material, and if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy." It would, in my opinion, be equally subversive of the contract, which the parties make for themselves, to hold (as Lord Young apparently does) that there can be no breach of such warranty, unless it is proved that the answer of the assured, being untrue, was made by him either willfully and in the knowledge of its untruth, or inexcusably, in the sense of its having been a blamably reckless or careless assertion.

An ingenious argument was addressed to your Lordships by the respondent's counsel, for the purpose of showing that the seventh question, from its very nature, involved only matter of opinion and not of fact, and consequently that any reply to it must be treated as an expression of opinion, and not as an assertion of fact. It appeared to me that their argument, which turned upon a very fine-drawn distinction between what were termed matters of pure fact and matters of opinion, had really no practical bearing upon the case before us. There are facts innumerable which can only be ascertained by the test of opinion, but they are not the less facts in a legal, whatever they may be in a metaphysical, sense. It appears to me

to be in vain to contend that the character of a man's habits, temperate or intemperate, is matter of opinion and not of fact. The second branch of the fourth question in the proposal submitted by the deceased furnishes an apt illustration of that which, in the ordinary sense, is a matter of mere opinion as distinguished from matter of fact. It runs thus: "Do you consider yourself of a sound constitution?" That is a query which obviously relates, not to the soundness of the assured's constitution, but to his own opinion on the subject; and in that respect it presents a marked contrast to the terms of the seventh question.

It was also argued by the respondents that in Scotland it has been long settled, by decision, that such a question as the seventh, occurring in a proposal made by the assured, as the basis of a policy upon his own life, is merely intended to elicit the personal opinion or belief of the assured, and that the deceased, William Weems, must be presumed to have given the answer, now said to be untrue, in reliance on that judicial interpretation. It is necessary, therefore, to examine the two authorities which were cited in support of that proposition by the respondents' counsel.

The first of these authorities is the case of *Hutchison and Others v. National Loan Fund Life Assurance Company*, 7 Court Session Cas., 2d series, 467, which was decided by the First Division of the Court of Session, on 21st of February, 1845. A lady of the name of Armstrong had, in February, 1843, effected an assurance upon her own life with the company, and she died in November of the same year. Her proposal, which was made the basis of the contract of assurance, contained this query, "Has the party an habitual cough, or any disease or symptom of disease?" To which the answer was "No," and also a declaration "that I am now in good health, and do ordinarily enjoy good health." In defense to an action for the amount of the policy, the company alleged that the assured was, at the date of the insurance, of intemperate habits, and laboring under disease of the liver, which resulted in dropsy, of which she died. The Lord Ordinary reported the case upon issues, to the First Division, when the argument turned upon the defenders' pleas, to the effect that the policy was void, by reason of there having been a breach of the war-

ranty that the insured was in good health, and had no disease or symptom of disease. What the court held is best explained by their interlocutor: "Find that whatever issues may be granted for trying this case, the proposal of Mrs. Armstrong, and declaration therein referred to, form the basis of the contract in the policy of insurance in question, and import a warranty only to the effect that the declarant was and had been, according to her own knowledge and reasonable belief, free from any disease or symptom of disease material to the risk, and that they do not import a warranty against any latent and imperceptible disease that could only be discovered by post-mortem examination, or from symptoms disclosing themselves at an after period of time." Whatever may be the merits of that judgment, it is beyond question that the main reasons assigned for it by the very learned judges who then constituted the First Division, go the full length of affirming that it would have been *pactum illicitum*, had the assured so answered the query as to take upon herself the risk of her being affected, at the time of entering into the policy, by a latent and deadly disease, the existence of which could only be discovered by a post-mortem examination. As might have been expected, the respondents' counsel did not attempt to vindicate the judgment by reference to these reasons, which they were not prepared to maintain, and preferred to rest it upon another and more reasonable ground, which is very clearly indicated in the opinion of Lord Fullerton. His Lordship construed the answer and declaration as together amounting to nothing more than a statement by the assured that she was at the time in good health; and he further held that "good health," in the ordinary sense of the term, means "the perfect conscious enjoyment of all one's faculties and functions, and the conscious freedom from any ailment affecting them, or any symptom of ailment."

The second of these authorities is *Life Association of Scotland v. Foster*, 11 Court Sess. Cas., 3d series, 351. In that case the association brought an action to reduce a policy which had been effected with them by the deceased, Mrs. Mary Foster, upon her own life, in respect of an alleged breach of warranty. The proposal for assurance contained a declaration by the deceased "that I am at present in good health, not being afflicted

with any disorder, external or internal," and an agreement by her that if any untrue statement were made therein, "or in the answers to questions by the society's medical officer in reference to this proposal," the assurance should be null and void. A number of questions were put to Mrs. Foster by the medical officer. The fourth of these was: "Are you now in your own opinion in perfect health?" to which her answer was "Yes;" and the sixth was in these terms: "Have you had rheumatism, gout, rupture, fits, asthma, spitting of blood, disease of the chest, or any affection of the kidneys or urinary organs?" to which she answered, "No." To her questions and answers there was appended a declaration by the assured, setting forth that the above statements were "faithful and true." The assured died of rupture, on the 30th of November, 1871, six months and a half after the date of the proposal. A proof was led, from which it appeared that, at the time when she made that proposal—and for some months previously—the assured had a small swelling on her groin, which caused her no inconvenience, and did not affect her general health. That swelling, as subsequent events showed, was due to hernia; but there was no reason whatever to suppose that the deceased knew that she was affected by hernia, or that the swelling in question indicated to her the existence of that disease. The First Division of the court, before whom the case depended, held that there had been no breach of warranty, and assolizied the defenders. It is of importance to observe that the pursuers of the reduction did not plead the untruth of any statement made by the deceased in her proposal for assurance. The only statements upon which they relied as untrue, and therefore constituting a breach of warranty, were those made by the assured in reply to the questions put by their medical officer. Upon this point the Lord President (Inglis) says: "It is not alleged by the pursuers that there is any untrue averment in the words of the declaration itself. They admit that Mrs. Foster was within the fair meaning of the words 'in good health' and not 'afflicted with any disorder, internal or external.'" The controversy between the parties was therefore narrowed to the single issue—whether the assured, by her sixth reply to the medical officer, had asserted that she was not at the time affected by latent disease, such as rupture, or any of the other

diseases specified in his question. It appears to me to have been rightly decided by the learned judges that the assured did not make an assertion to that effect. The assured was, in my opinion, entitled to assume that the object of the doctor who put questions to her concerning her health, in the course of his medical examination, was to elicit from her such facts as were within her knowledge for his own information and guidance; and, to my mind, the terms of the sixth query indicate that it was addressed to her for no other purpose. The assured had already told him, in reply to query fourth, that, "in her own opinion," she was, at the time, "in perfect health." That was followed up by the sixth query, which does not ask, "Have you, at present, rheumatism, gout, rupture, etc.," but "Have you had these diseases or any of them?" The query relates not to present time, but to the past; and whilst it can be reasonably construed as referring to every form of active disease of which the assured must have been previously conscious, I think it would be unreasonable to hold that the query was meant to refer to antecedent latent disease, of which the assured was unconscious.

I am accordingly of opinion that *Life Association of Scotland v. Foster* has really no bearing upon the doctrine in support of which it was cited. A very different question would have arisen for decision in that case if the assured had, in the proposal which she submitted as the basis of assurance, affirmed that she was not, "at the time," affected with hernia. As for the case of *Hutchison v. National Loan Fund Life Assurance Company*, it is impossible to assent to the general principles upon which it was decided; and, to my mind, it is not clear that the decision could be justified upon other grounds. But it is unnecessary to consider that question, because, assuming these cases to have the effect contended for, they do not appear to me to give the least support to the respondents' case. Both these authorities relate to internal disease, of the existence of which the person affected is unconscious, and which medical examination cannot detect until he is *in extremis*, or, it may be, until life is extinct; and the only point arising for decision was, whether a particular query or statement was so expressed as to include latent and unknown, as well as apparent and known, diseases. But intemperate habits

are certainly not, in any sense, latent disease only discoverable in a post-mortem examination. Such habits may, in some instances, be occult ; but, as a general rule, the knowledge of them is not confined to their owner : indeed, it may happen that their outward manifestations are more readily appreciated by bystanders than by the man himself. The purpose for which such a query as the seventh question in this case is addressed to intending insurers is to elicit the fact and not the opinion of the assured ; and, if he chooses to give a satisfactory answer, he must take the risk of its being true. If his answer is hesitating or unsatisfactory, the insurers are put upon their guard, and have the option of declining the assurance, or seeking information from other sources, or of charging a higher premium.

I now come to the second question in this appeal, which, as I have already said, is a question not of law but of fact. Was the late William Weems, on the 9th of November, 1881, and had he previously been, a man of "temperate habits," as he then asserted ? If that question must be answered according to the truth, and not according to the personal belief of the deceased, two of the judges of the Second Division, the Lord Justice Clerk and Lord Rutherford Clark, were of opinion that he was not. It does not clearly appear what view of the evidence would have been taken, upon that assumption, by Lords Young and Craighill ; but I think the Lord Ordinary was prepared to hold, and did hold, that the deceased was, in point of fact, a man of temperate habits within the meaning of the seventh question. I entirely agree with many of the observations which were made by the Lord Ordinary in regard to what ought, for the purposes of this case, to be considered as constituting temperate habits, although, upon the evidence before us, I am unable to come to the same conclusion as his Lordship. I am disposed to think that the learned judge must have attached undue weight to the case of the *Knickerbocker Life Assurance Company of New York v. Foley*, 15 Otto, 350, in regard to the rubric of which his Lordship says : "The law here stated is that which the Lord Ordinary adopts, and which he has endeavored to apply in his present judgment." Now, as I read the rubric and report, there was no law laid down in that case. An American jury had found that a man was of

temperate habits, although it had been proved at the trial that he had an attack of delirium tremens; and the court refused to disturb the verdict, the main reason assigned for that decision being a statement occurring in some treatise on medical jurisprudence to the effect that, in the case of an intemperate man, delirium tremens is occasioned by abstinence from drink, and, in the case of a temperate man, by indulgence in liquor. Even if it had been laid down as matter of law, I should hesitate very much to adopt such a standard as that. A man suffering from delirium tremens occasioned by recent drinking may possibly be more temperate than another man who is similarly afflicted in consequence of his having abstained from his usual potations; but I should not like to affirm that either of them was, in the ordinary sense of the term, a man of temperate habits. It is, however, perfectly clear that a mere finding of fact by a jury cannot—although the court may have declined to set it aside and grant a new trial—form any precedent for the guidance of a court of law.

I believe it to be useless to attempt a precise definition of what constitutes “temperate habits,” or “temperance,” in the sense in which these expressions are ordinarily employed. Men differ so much in their capacity for imbibing strong drinks that quantity affords no test; what one man might take without exceeding the bounds of moderation, another could not take without committing excess. In judging of a man’s sobriety, his position in life, and the habits of the class to which he belongs, must, in my opinion, always be taken into account, because it is the custom of men engaged in certain lines of business to take what is called refreshment, without any imputation of excess, at times when a similar indulgence on the part of men not so engaged, would be, to say the least, suspicious. But I do not think that the habits of a particular locality ought to be taken into account, or that a man who would be generally regarded as of intemperate habits ought to escape from that imputation because he is no worse than his neighbors. In the present case the evidence clearly establishes that the assured was a most able and estimable man; but that circumstance is not of much weight, because able and estimable men are not necessarily exempt from social failings. I shall not dwell upon the details of the proof, of the import of which

I take very much the same view which is clearly and succinctly expressed in the opinion of Lord Rutherford Clark. It seems to me to be the fair result of the evidence, that the assured was in the habit of taking more drink than was good for him; that he was frequently affected with drink on occasions when all except himself were sober; that his indulgence to excess had become so apparent that several of his friends remonstrated with him on the subject, and that, instead of repudiating the charge, he admitted it and promised amendment. These facts appear to me to be fully proved, and they are, in my opinion, altogether inconsistent with the truth of the assertion that he was, on the 9th of November, 1881, of temperate habits, and had always been so. I cannot, in considering this part of the case, leave out of view the cause of the assured's death, as certified by the late Dr. Colligan. The statement in his certificate was made by Dr. Colligan in the ordinary course of his professional duty, and in compliance with statutory enactment. There is nothing to suggest that the statement was made dishonestly or even negligently; and it is, in my opinion, good *prima facie* evidence of what the medical attendant of the assured judged and believed to be the cause of his death. Of course it is not conclusive evidence that death was due to chronic hepatitis; it may be rebutted. But the testimony of Dr. Hunter is not, in my opinion, sufficient to displace it. That gentleman saw the assured at Bridge of Allan about a month before his death; but he did not examine the assured, or visit him professionally, until within a few days of his decease, after congestion of the brain had set in. The witness had not the same opportunity of determining what was the primary disease as the medical attendant of the patient who visited him daily for a fortnight before brain symptoms supervened; and the facts certified by Dr. Colligan are strongly corroborated by the other evidence in the case.

Interlocutors appealed from reversed.

NEW YORK COURT OF APPEALS, 1882.

BURLEIGH v. GEBHARD FIRE INS. CO.

(90 N. Y. 220.)

Interpretation of a warranty.

Action by court without jury upon two policies of insurance issued to plaintiffs. The property insured was personal, and its location is described as follows: "All contained in their frame storehouse with slate roof, situate, detached at least one hundred feet, on the east side of Lake Champlain, in the town of Shoreham, Vt."

The court found from the evidence that a little shanty or office, standing seventy-five feet distant from the storehouse in which the property insured was situated, containing a small quantity of gunpowder, did not increase the risk nor create any additional exposure of the latter to the fire, and refused to find the contrary.

The court also found and decided that the words contained in each policy, above quoted, did not constitute a *warranty*, on the part of the insured, that the building was one hundred feet from the small shanty called an office; that the existence of the small building within seventy-five feet of the storehouse containing the property insured did not in fact increase the risk.

FINCH, J.—We think the statement contained in the policies issued by the defendants, describing the building which contained the personal property insured as "detached at least one hundred feet," is a warranty. We cannot hold it to be a mere description of the building for the purpose of identifying the personal property insured contained within it. The phrase is not adapted to any such purpose. It adds nothing to the identity of the storehouse, already sufficiently described by its ownership and situation on the lake. In *Wall v. The East River Mut. Ins. Co.*, 7 N. Y. 370, the personal property insured was described as "contained in the brick building with tin roof, *occupied as a storehouse*, situated on the northerly side of and about forty-two feet distant from their ropewalk at Bushwick." The court said that the identity of the building

was distinctly ascertained by other facts of the description, and that the phrase "occupied as a storehouse" related to the risk and could not be otherwise applied. The language in the policies before us, as to the detached character of the building, applies fitly to the risk, and is entirely inappropriate as matter of description. We must hold, therefore, what indeed was not denied in the dissenting opinion at General Term or on the argument at our bar, that the phrase in question is not merely descriptive of identity, but relates to the character of the risk. Thus understood and appearing on the face of the policy, it amounts to a warranty. *Alexander v. Germania Fire Ins. Co.*, 66 N. Y. 464; *Richards v. Protection Ins. Co.*, 30 Me. 273; *Parmelee v. Hoffman Fire Ins. Co.*, 54 N. Y. 193. Such result is, however, disputed upon the ground that the language is that of the insurers and is vague and void for ambiguity. The argument is that to avoid a forfeiture the words used must be most strongly construed against the insurer; that the word "detached" will not be defined so as to destroy the contract; that in the sense of separate, or disengaged from, the policy does not add from what; that it may mean "detached at least one hundred feet" from "earth, sea, or sky," or from "Lake Champlain;" and that if it means from any building, it must be construed to mean any building which constitutes an exposure and increases the risk, which was not true of the office building, since the trial judge found as a fact that it did not so increase the risk. We do not think the language is so vague or ambiguous as to make the warranty void. The fair import of the words and the intent of the parties indicated by the terms of their agreement must guide the construction. *Higgins v. Phoenix Mut. Life Ins. Co.*, 74 N. Y. 6. It cannot be doubted that both parties perfectly understood the meaning of the phrase to be that the storehouse stood by itself as a detached or separate building, and apart from other buildings at least a distance of one hundred feet. The expression, although brief, is not meaningless, but to the common understanding, and especially in connection with an insurance against fire, conveys unmistakably the idea we have expressed, and must have been so understood by each of the contracting parties. If it did not mean that, it meant nothing, and what was intended as a serious business transaction becomes an idle play with words. But the

further contention, that the language must be held to mean, detached one hundred feet from any other building of such character as to constitute an exposure and increase the risk, seems to us a sensible and just construction. The brevity of the language requires that something be added to complete and elucidate the meaning. The phrase may mean, detached one hundred feet from any other building, whatever its size or character. This would be a rigorous and severe interpretation, most favorable to the insurer and operating harshly upon the insured. So construed, it would make anything which could be deemed a building, however small or insignificant, as an ice-house, or privy, or open shed, within the prescribed distance, operate as a breach of the warranty. If a construction so literal or severe is intended by the insurer, he should at least say so by apt and appropriate language, and not ask the courts to supply it by intendment. If it be granted that such small and insignificant structures were not meant, and should be treated as if they did not exist, the question would remain, how small and how insignificant must they be to be disregarded, and how large and of what character to justify a conclusion of breach of the warranty, and where and upon what principles is the line to be drawn between buildings strictly such, but proper to be disregarded, and those whose presence breaks the warranty. These questions can be wisely answered in but one way. The test must be whether the building within the distance named is or is not an exposure which increases the risk. One which does not can scarcely be supposed to come within the warranty, unless such result is indicated by explicit language which will bear no other reasonable interpretation. No such language is contained in these policies, and when the courts are asked to supply a defect and complete an imperfect phrase, they should remember that the necessity is the fault of the insurer, and construe the language in view of the natural understanding of the parties, and with justice to both. Declining to hold the phrase in the policy to be meaningless and void, we are compelled to choose between two constructions; the one rigorous and hard and producing a forfeiture, and the other natural and reasonable and supporting the obligation. We have heretofore decided that in such case the latter construction is to be preferred. *Baley v. Homestead Fire Ins. Co.*, 80 N. Y. 21; 36

Am. Rep. 570. We hold, therefore, that the warranty in this case was that no other building, of such size and character as to constitute an exposure and increase the risk, stood within one hundred feet of the storehouse.

Thus construed, it is apparent that the warranty was not broken. The findings of fact, taken together, show that the only building within the prescribed distance of one hundred feet was the small office. This was described as being ten by twelve feet on the ground, and seven feet high; a frame building clapboarded and ceiled inside; having a chimney, but no stove in it; used sometimes as an office, and at the time of the fire containing a quantity of gunpowder, temporarily stored. The evidence showed, or at least tended to show, that this building, standing seventy-five feet from the subject of insurance, was not an exposure and did not affect the risk, and the trial court found that fact substantially, and refused to find the contrary. It follows that there was no breach of the warranty, and that the General Term erred in so deciding and in reversing the judgment.

All concur, except RAPALLO, J., dissenting, and MILLER, J., not voting.

Orders reversed.

CHAPTER VI.

GENERAL PRINCIPLES.

Waiver and Estoppel.

UNITED STATES SUPREME COURT, 1871.

UNION MUT. INS. CO. v. WILKINSON.

(13 Wall. 222.)

Nature of a waiver or an estoppel, and how it may be established.

THE Union Mutual Insurance Company, of Maine, insured the life of Mrs. Malinda Wilkinson in favor of her husband. Both husband and wife, prior to the rebellion, had been slaves, and the husband came to Keokuk, Iowa, from Missouri. The company did business in Keokuk (where the application was made and the policy delivered), through an agent, one Ball, to whom it furnished blank applications. The mode of doing business appeared to have been that the agent propounded certain printed questions, such as are usual on applications for insurance on lives, contained in a form of application, and took down the answers; and when the application was signed by the applicant, the friend and physician forwarded it to the company, and if accepted, the policy was returned to this agent, who delivered it and collected and transmitted the premiums.

On this form of application were the usual questions to be answered by the person proposing to effect the assurance; and by the terms of the policy it became void if any of the representations made proved to be untrue.

Among the questions was this one:

“Has the party ever had any *serious* illness, local disease, or *personal injury*; if so, of what nature, and at what age?”

And the question was answered :

“No.”

So, too, after an interrogatory as to whether the parents were alive or dead—they being, in the case of Mrs. Wilkinson, both dead—were the questions and answers :

“*Question.* Mother’s age, at her death ?

“*Answer.* 40.

“*Question.* Cause of her death ?

“*Answer.* Fever.”

Mrs. Wilkinson having died, and the company refusing to pay the sum insured, Wilkinson, the husband, brought suit in the court below to recover it. The defence was that the answers as above given to the questions put were false ; that in regard to the first one, Mrs. Wilkinson, in the year 1862, had received a serious personal injury, and that in regard to the others, the mother had not died at the age of 40, but at the earlier age of 23, and had died not of fever but of consumption.

As to the first matter, that of the personal injury, the judge (under a rule of practice in the State courts of Iowa, adopted by the Circuit Court of that district, and which allows the jury in addition to its general verdict to find also special verdicts and answers to interrogatories put) required the jury to respond to certain interrogatories. These and the answers to them were thus :

“*Interrogatory.* Did Malinda Wilkinson, in the year 1862, receive a serious personal injury, by falling from a tree ?

“*Answer.* Yes, injured ; not seriously.

“*Interrogatory.* Were the effects of such fall temporary, and had these effects wholly passed away without influencing or affecting her subsequent health or length of life prior to the time when the application for insurance in this case was taken ?

“*Answer.* Yes.”

As to the other matter, the age at which the mother died and the disease which caused her death, evidence having been given by the defendant tending to show that she died at a much younger age than forty years, and of consumption, the plaintiff, in avoidance of this, was permitted (under the defendants’ objection and exception) to prove that the agent of the insurance company, who took down the answers of the applicant and his wife to all the interrogatories, was told by both

of them that they knew nothing about the cause of the mother's death, or of her age at the time; that the wife was too young to know or remember anything about it, and that the husband had never known her; and to prove that, there was present at the time the agent was taking the application, an old woman, who said that *she* had knowledge on that subject, and that the agent questioned her for himself, and from what *she* told him he filled in the answer which was now alleged to be untrue, without its truth being affirmed or assented to by the plaintiff or the wife.

This the jury found in their special verdict, as they had the other facts, and found that the mother died at the age of 23; did not die of consumption; and that the applicant did not know when the application was signed how the answer to the question about the mother's age and the cause of her death had been filled in.

In charging the jury, the court said, on the first branch of the case—that relating to the personal injury—that if the effects of the fall were temporary, and had entirely passed away before the application was taken, and if it did not affect Mrs. Wilkinson's health or shorten her life, then the non-disclosure of the fall was no defense to the action; but, on the other hand, that if the effects of the fall were not temporary, and remained when the application was taken, or if the fall affected the general health, or was so serious that it might affect the health or shorten life, then the non-disclosure would defeat recovery, although the failure to mention the fall was not intentional.

On the second branch—that relating to the age of the mother—the court said to the jury, that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others in answer to inquiries *he* made of them, and upon the strength of his own judgment, based upon data thus obtained, it was no defense to the action to show that the agent was mistaken, and that the mother died at the age of twenty-three years.

Verdict and judgment having gone for the plaintiff, the insurance company brought the case here on error.

Mr. Justice MILLER delivered the opinion of the court.

On the first branch of the case the court said to the jury, that if the effects of the fall were temporary, and had entirely passed away before the application was taken, and if it did not affect Mrs. Wilkinson's health or shorten her life, then the non-disclosure of the fall was no defense to the action. On the other hand, if the effects of the fall were not temporary, and remained when the application was taken, or if the fall affected the general health, or was so serious that it might affect the health or shorten life, then the non-disclosure would defeat recovery, although the failure to mention the fall was not intentional or fraudulent.

It is insisted by counsel for the defendant, that, if the injury was considered serious *at the time*, it is one which must be mentioned in reply to the interrogatory; and that whether any further inquiry is expedient on the subject of its permanent influence on the health, is for the insurer to determine before making insurance. But there are grave and obvious difficulties in this construction. The accidents resulting in personal injuries, which at the moment are considered by the parties serious, are so very numerous that it would be almost impossible for a person engaged in active life to recall them at the age of forty or fifty years; and if the failure to mention all such injuries must invalidate the policy, very few would be sustained where thorough inquiry is made into the history of the party whose life is the subject of insurance. There is, besides, the question of what is to be considered a serious injury at the time. If the party gets over the injury completely, without leaving any ill consequence, in a few days, it is clear that the serious aspect of the case was not a true one. Is it necessary to state the injury and explain the mistake to meet the requirements of the policy?

On the other hand, when the question arises, as in this case, on a trial, the jury, and not the insurer, must decide whether the injury was serious or not. In deciding this, are they to reject the evidence of the ultimate effect of the injury on the party's health, longevity, strength, and other, similar considerations? This would be to leave out of view the essential purpose of the inquiry, and the very matters which would throw most light on the nature of the injury, with reference to its influence on the insurable character of the life proposed.

Looking, then, to the purpose for which the information is sought by the question, and to the difficulty of answering whether an injury was serious, in any other manner than by reference to its permanent or temporary influence on the health, strength, and longevity of the party, we are of opinion that the court did not err in the criterion by which it directed the jury to decide the interrogatory propounded to them.

Passing then to the second branch of the case. The defendant excepted to the introduction of the oral testimony regarding the action of the agent, and to the instructions of the court on that subject; and assigns the ruling of the court as error on the ground that it permitted the written contract to be contradicted and varied by parol testimony.

The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; and though the courts, in a common law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreements, such an inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him.

In the case before us a paper is offered in evidence against the plaintiff containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the parol testimony makes it clear beyond a question, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so, and, in fact, had refused to make any statement on that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by some one who was his agent alone in the matter, and forwarded to the principal office of the defendant corporation, and acted upon as true, by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement, and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not, after the event, be permitted to show his own mistake or carelessness to the prejudice of the corporation.

If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto.

It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is that where one party has by his representations or

his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country. Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now considering, Ball, the insurance agent, who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal.

Although the very well-considered brief of counsel for plaintiff in error takes no issue on this point, it is obvious that the soundness of the court's instructions must be tested mainly by the answer to be given to the question, "Whose agent was Ball in filling up the application?"

This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured; and if left to himself, or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known—so well that no court would be justified in shutting its eyes to it—that insurance companies organized under the laws of one State, and having in that State their principal business office, send these agents all over the land with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained,

and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are, *prima facie*, co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal.

In the fifth edition of "American Leading Cases," after a full consideration of the authorities, it is said:

"By the interested or officious zeal of the agents employed by the insurance companies, in the wish to outbid each other and procure customers, they not unfrequently mislead the insured, by a false or erroneous statement, of what the applica-

tion should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers." *Rowley v. Empire Ins. Co.*, 36 N. Y. 550.

The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

Judgment affirmed.

NEW YORK COURT OF APPEALS, 1877.

VAN SCHOICK v. NIAGARA FIRE INS. CO.

(68 N. Y. 434.)

An act of the company's agent in recognition of the validity of the contract, coupled with knowledge of a ground for forfeiture, will amount to a waiver.

FOLGER, J.—This was an action upon a policy of fire insurance. It contained this condition: "Any interest in property insured not absolute, or that is less than a perfect title, or if a building is insured that is on leased ground, the same must be specifically represented to the company, and expressed in this policy in writing, otherwise the insurance shall be void." The fact is, that part of the property described in the policy, as subject of the insurance, was a building on leased ground. That fact was not expressed in writing in the policy. The defendant claims that thereby the insurance was void, and puts itself thereon as a defense to the action. It is to be observed of this condition, that it is not one of those which are subsequent to the formation of the contract, a breach of which may

occur after there has been a valid contract made and entered into, and continued in existence for a part of its prescribed term. It is a condition precedent, lying at the threshold of the making of the contract, and which, if not then performed or not then obviated, prevents the formation of an enforceable contract. It is obvious that, this building being on leased ground, the very moment that the policy passed from the defendant to the plaintiff the insurance on it was void, if the condition holds. They were concurrent acts, the delivery of the contract, and a breach of this condition; so that at the same instant that the defendant said we insure this building, at the same instant the condition was broken and the insurance was void. So that, if nothing is shown to break the rigid effect of this condition, there never was any insurance by this defendant upon that building. We would scarce expect two parties to go through so senseless and trifling an act, if the facts were known to each at the time; but would rather conclude that they had by words or act agreed that the condition should not be considered as binding. "If these defendants were an entity, and could have stood near to that building when the oral negotiation for insurance was made and completed, and have seen" and known that it was upon leased ground, "could it fairly be contended that they would have offered to the plaintiff, or that he would knowingly have received, as the correctly written evidence of the contract, this policy, with the condition in question contained in it as an operative and binding clause? We cannot suppose that either plaintiff or defendant would do the utterly absurd thing of making, with deliberation and knowledge, a contract that was void from inception, and was in contradiction of the facts and statements of the negotiation." It is plain that the plaintiff and the agent meant to contract and did contract for the insurance of that building as a building on leased land. *Cone v. Niag. Fire Ins. Co.*, 60 N. Y. 619. Hence we are not surprised that the plaintiff claims that the fact that the building was on leased ground was made known to the defendant when the policy was applied for; and that the policy was delivered and the premium accepted by them without insisting upon the fact and the condition. He makes that action of the company, with that knowledge, his reply to their defense based on that condition and its breach.

We must first inquire whether the plaintiff is right as to the fact of the prior knowledge of the defendant that the building was upon leased ground. It is shown that at a time previous to the issuing of this policy the facts in relation to the title of the property, just as they were (that the land was owned by one person and the building by another, and the contract between them), were told to one Lewis, an insurance agent. This Lewis, when the policy in suit was issued, having this information, and with a view to this insurance, asked if there was any change in the property, and was told that there was not. So that, at the time of the issuing of this policy, Lewis was informed of the fact that this building was within the scope of this condition. It is now to learn if Lewis was the agent, or substantially so, of the defendant. It is shown that one Doolittle was the commissioned and ostensible agent of the defendant, but that Lewis and he were in partnership in the business of soliciting and procuring insurance; that Lewis did with assent of Doolittle so act as to this defendant; that such action was known to defendant and not disapproved of by it; that a joint commission had for some time been promised by the defendant to those two as its agents, which was delayed, but finally issued before the delivery of this policy. *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117. We think that the facts bring the case within that decision. So that, as the information of the agent is the information of his principal, the defendant, when it accepted this risk, had information that this building stood upon leased ground. Besides that, in stating these facts as they appeared to him on the motion of the defendant that the court direct a verdict for it, the learned judge who held the circuit assumed or found that Lewis had the relations of an agent to the defendant. No objection was made by the defendant to this, nor any request to go to the jury upon it as a question of fact. So it must be taken as a conceded fact in the case. *Tallman v. Atlantic Ins. Co.*, 3 Keyes, 87.

And so again comes up the oft-recurring and still vexed question between insurance companies and their policy-holders—whether a fact, thoroughly well known and comprehended by both sides to the contract before it is delivered, may, by force of some condition, crouched unseen in the jungle of printed matter with which a modern policy is overgrown, make a de-

fense for the company, after the catastrophe and damage has happened against which it professes to guard. It is to be confessed that the decisions in this State do not, upon a cursory perusal at least, seem strictly in harmony in regard to it. There are cases which hold that where an application is made a part of the policy by the terms of it, and some false assertion has been inserted in the application by the agent, when the truth has been at the same time well known to him, that the insured shall not be prejudiced thereby; *Rowley v. The Empire Ins. Co.*, 3 Keyes, 557; *Plumb v. Catt. Ins. Co.*, 18 N. Y. 392; *Ames v. N. Y. Ins. Co.*, 14 N. Y. 253. There are others where the fact fell within the condemnation of some condition of the policy; yet as the fact, as it existed, was known to the company, it was held to be estopped from setting up the condition against a recovery; 14 N. Y., *supra*; *Bidwell v. N. W. Ins. Co.*, 24 id. 302; *Bodine v. Exchange Ins. Co.*, 51 id. 117. There are others in which there was a suit in equity, seeking a reformation of the contract, and it was held that the facts showed unmistakably that the parties never meant to enter into a contract with such a condition or description in it as was set up against a recovery; *Cone v. Niagara Ins. Co.*, 60 N. Y. 619; *Maher v. Hibernia Ins. Co.*, 67 id. 283. In the latter case, the facts made a clear *estoppel in pais* against the company. It has also been held that a warranty, part of the printed matter of the policy, has been dispensed with by the oral agreement of the parties made before the delivery of the policy; *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 505. On the other hand, in an action at law it has been held, that, where the terms of the policy are clear and unambiguous, parol proof is inadmissible to vary them, or to show that either or both parties were not aware that they were exchanging a contract such as was requested, and as agreed with the facts in the situation of the property. *Pindar v. Resolute Ins. Co.*, 47 N. Y. 114; see also *Rohrback v. Germania Ins. Co.*, 62 id. 47. And so it has been held that parol proof is not admissible to show that both parties knew that a statement in an application for a policy was not true; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136. Other cases bearing upon the subject might be cited—*quantum suff.*

There is no doubt but that, ordinarily considered, this condition in the policy was a warranty that the building did not

stand upon leased land, and that the truth of that warranty became a condition precedent to any liability on the part of the defendant. Yet there is no doubt, too, that a condition in a policy may be waived by the insurer, or, as some cases put it, he be estopped from setting it up, and that such result may be worked by parol, or by act without words. It has been held over and over, that the customary clause in a policy, that it will not be binding upon the insurer until the premium is paid in fact, may be waived by parol or by act, and the policy may be delivered and become a binding contract upon the insurer without payment in hand of the premium; *Trustees, etc., v. Br. Ins. Company*, 19 N. Y. 305; *Sheldon v. Atlantic Fire Ins. Co.*, 26 id. 460; *Wood v. Po. Ins. Co.*, 32 id. 619; *Boehen v. Wms. B. City Ins. Co.*, 35 id. 131; *Bodine v. Ins. Co.*, 51 id. 117. As to other waivers, see *Ludwig v. Jersey City Insurance Company*, 48 N. Y. 384, and cases there cited; *Shearman v. Niagara Fire Insurance Company*, 46 id. 532. Now, in this first class of cases, it has been thought that the fact that the insurer delivered to the insured the written contract as the consummated agreement between them, and did not then exact present payment of the premium as a necessary precedent to delivery, was too plainly in contradiction with the condition for prepayment for it to be supposed that it was meant by the insurer or supposed by either party that it was intended to make that condition a potent part of the contract. Such a provision, it is said, could have no effect upon the delivered and perfect contract in which it was contained; 19 N. Y., *supra*. It would be imputing a fraudulent intent to the defendant in this case, to say or to think that they did not mean, when they delivered this policy to the plaintiff, to give him a valid and binding contract of insurance, or that they did not mean that he should believe that he had one, or that they did not suppose that he did so believe. And such imputation can be avoided only by supposing that it had overlooked this condition, and so forgotten to express the fact as to the building, in writing, upon the policy; or that it waived the condition, or held itself estopped from setting it up. The condition of prepayment of premium is, like this under consideration, one at the threshold of the making of the contract, and, if it is not observed, no valid contract is made unless it is stepped over or thrust aside.

It is consistent with fair dealing and a freedom from fraudulent purpose to hold that one or the other was done; that is, that there was waiver, or an estoppel.

There are other conditions precedent which may be waived. Thus in *Myers v. Life Insurance Company*, 27 Penn. St. 268, it is said that the countersigning by the agents is under some circumstances not essential, though required by condition. The ground there stated is, that, on an equitable interpretation of the whole contract, it may become the duty of the court to dispense with a portion of the forms of the contract, if it can find any reliable substitute for them, on the principle that cures defective execution of powers where the intention to execute is sufficiently plain. The contract was to be complete when delivered by the agents, and countersigning by them was to be the appointed evidence of its proper delivery. There may be other evidence, to be regarded as equivalent. So here it was not that the defendant would not at all insure a building on leased lands. They did agree to take a risk upon it. But, to have it insured by them, the fact of it being on leased land must be expressed to them. This was done. As evidence that it was done, it must, they said in the policy afterwards delivered, appear in writing on the policy. This is, like countersigning by agent, but one of the forms of making the contract. That the policy was delivered, and the premium received, with full purpose of insuring that building, with full purpose of making a valid and obligatory contract, is evidence that through neglect or forgetfulness one of the forms was not observed, or that it was waived by the parties.

This case is to be distinguished from that of *Pindar*, 47 N. Y. 114. There Pindar asked a policy in a certain form of words. The insurer issued it to him in a different form; and in such form as would not cover certain classes of goods, and as, by the presence of those classes in the store, rendered the whole policy void. It was not proposed to show that the insurer knew that the very class of goods on which insurance was sought was in the store, and that the policy was delivered with the purpose to insure that class, and with the mutual understanding that by the policy it was insured. Hence, that case differs from this, and it was properly held that Pindar was bound by his contract. In *Rohrbach's Case*, *supra*, the

decision went upon the effect of a peculiar clause in the policy, and in that fact is quite different from this. *Chase v. Hamilton Insurance Company*, 20 N. Y. 52, is put upon a ground very like that in *Rohrbach's Case*: that it was printed in the application, that the company would not be bound by knowledge of the agent, and that the company could not be held thereby, unless there was fraud, or prevention of the application from making a true statement. *Ripley v. The Aetna Insurance Company*, 30 N. Y. 136, is to be distinguished from this in hand. There the representation or warranty was promissory. It was an agreement by the applicant that he would thereafter keep a watchman in his mill of nights. This looked to the future conduct on his part. It was not a part of the form of the contract. And though the agent of the insurer knew the custom of the applicant had not been to keep a watchman in his mill from midnight on the last day of the week till midnight of the first day of the next week, that did not affect his promise thereafter to do differently.

It is difficult to make all the cases upon this subject harmonize; but, by the force of authority, we are constrained to hold, that such a condition as this may be waived by the insurer, by express words to that effect, or by acts done under such circumstances as would otherwise impute a fraudulent purpose, and as will estop him from setting up the condition against the insured.

We, therefore, conclude that the judgment appealed from should be affirmed.

CHURCH, Ch. J., ANDREWS and MILLER, JJ., concur; ALLEN, RAPALLO, and EARL, JJ., dissent.

Judgment affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS, 1872.

DEWEES v. MANHATTAN INS. CO.

(6 Vroom, 366.)

The opposing view ; namely, that the terms of the policy cannot be disturbed by parol testimony of what occurred at or prior to its inception.

Assumpsit on a policy of insurance.

BEASLEY, CHIEF JUSTICE.—The contract between these litigants, on the point which I shall discuss, is clear and unambiguous. The defendants agreed to insure a building occupied as a country store, and the stock of goods, consisting of the usual variety of a country store. This, by the plain meaning of the terms employed, is a warranty on the part of the insured that the building was used, at the date of the agreement, for the purpose specified. It was a representation, on the face of the policy, touching the premises in question, and which affected the risk ; and such a representation, according to all the authorities, amounts to a warranty. Formal words are not necessary for the creation of an obligation of this character, and, in fact, it usually arises from words of description which limit the risk contained in the written contract. For example, in a marine insurance, the words “to sail on such a day,” or “in port,” or “all well on such a day,” are plain warranties, demanding a literal fulfillment, and are quite as efficacious as would be a formal clause framed to effect the same purpose. Referring to a fire insurance, the court in *Wood v. The Hartford Fire Ins. Co.*, 13 Conn. 533, says any statement or description, on the part of the insured, on the face of the policy, which relates to the risk, is an express warranty, and such a warranty, being a condition precedent, must be strictly complied with, or the insurance is void. The same doctrine is maintained by the Court of Appeals of New York, in the case of *Wall v. The East River Mutual Insurance Company*, 3 Seld. 370, the policy in that instance being declared void on the ground that the building was described as being “occupied as a storehouse,” and it appeared it was used also for another purpose. The cases are numerous and decisive upon the subject—so much so that it does not appear to me to be necessary to refer to them in de-

tail, as, in my opinion, the character of a representation of this kind is apparent upon its face. It can be intended for no other purpose than to characterize the use of the building at the date of the insurance; for, unless this is done, there can be no restriction on the use of the property by the insured during the running of the risk. Unless this description has the force thus attributed to it, the premises could have been used for any of the most hazardous purposes. A building described in a policy as a "dwelling-house" could, except for the rule above stated, be converted into a mill or factory. I think it is incontestably clear that the description of the use of the premises in this case was meant to define the character of the risk to be assumed by the defendants.

But, besides this, it is plain that the written contract was violated in a fatal particular by the assured. By the express terms of one of the stipulations of the insurance, it is declared that, if the premises should be used "for the purpose of carrying on therein any trade or vocation, or for storing or keeping therein any articles, goods, or merchandise denominated hazardous, or extra hazardous, or specially hazardous, in the second class of the classes of hazards annexed to this policy, etc., from thenceforth, so long as the same shall be so used, etc., the policy shall be of no force or effect." Among the extra-hazardous risks, that of keeping a "private stable" is enumerated; and it was shown on the trial, and was not denied, that at the date of the policy, and at the time of the fire, a part of the building insured was applied by the plaintiff to this use.

It cannot be denied, then, that if we take into view these conditions of the case alone, the plaintiff's action must fall to the ground. He did an act which, by force of his written agreement, had the effect to suspend, temporarily, his insurance. As this fact, having this destructive effect, could not be disputed, it became necessary, in order to save the plaintiff's action, to avoid the effect of the written contract; and this burden was assumed, on the argument, by the counsel of the plaintiff. The position taken with this view was, that the policy was obtained for the plaintiff by the agent of the defendants, and that he knew that the building in question was, in part, used as a stable.

The plaintiff's claim appears to be a meritorious one, and

on this account, and in the hope that there might be found some legal ground on which to support this action, the case was allowed by me at the circuit to go to the jury, and the questions of law were reserved for this court. But the consideration which I have since given the matters involved has excluded the faintest idea that, upon legal principles, this suit can be successfully carried through. In my opinion, that end can be attained only by the sacrifice of legal rules which are settled, and are of the greatest importance. Let us look at the proposition to which we are asked to give our assent.

The contract of these parties, as it has been committed to writing, is, that if the plaintiff shall keep a stable on the premises insured, for the time being the policy shall be vacated. But, it is said, the agent of the defendants who procured this contract was aware that the real contract designed to be made was that the plaintiff might apply the premises to this use. This knowledge of the agent of the defendants, and which, it is conceded, will bind the defendants, is to have the effect to vary the obligations of the written contract. Upon what principle is this to be done?

There is no pretense of any fraud in the procurement of this policy. The only ground that can be taken is, that the agent, knowing that the premises were to be, in part, used as a stable, should have so described the use in the policy. The assumption is, and must be, that the warranty, in its present form, was a mistake in the agent. But a mistake cannot be corrected, in conformity with our judicial system, in a court of law. No one can doubt that in a proper case of this kind an equitable remedy exists. It is possible, therefore, that in this case, in equity, the present contract might be reformed so as to contain a permission for the plaintiff to keep his stable in this building; but I think it has never before been supposed that this end could be reached in this State by proof before the jury in a trial at the circuit. The principle would cover a wide field, for, if this mistake can be there corrected, so can every possible mistake. If the plaintiff can modify the stipulation with respect to the restricted use of the premises, on the plea of a mistake in such stipulation, on similar grounds it would be open to the company to modify the policy with respect to the amount insured. I am at a loss to see how, on the adoption of

the principle claimed, we are to keep separate the functions of our legal and equitable tribunals.

Nor do I think, if this court should sustain the present action, that it could be practicable to preserve, in any useful form, the great primary rule that written instruments are not to be varied or contradicted by parol evidence. The knowledge of the agent, in the present transaction, is important only as showing what the tacit understanding of the contracting parties was. Suppose, instead of proof of such tacit understanding, the plaintiff had offered to make a stronger case, by showing that the agent expressly agreed that the building might be used not only as a country store, as the policy stated, but also as a stable, and that the restraining stipulation did not apply to the extent expressed. Can any one doubt that, according to the practice and decisions in this State, such proof should have been rejected? A rule of law admitting such evidence would be a repeal of the principle giving a controlling efficacy to written agreements. The memory and understanding of those present at the formation of the contract would be quite as potent as the written instrument.

I have not found that it is anywhere supposed that this general rule which illegalizes parol evidence, under the conditions in question, has been relaxed with respect to contracts for insurance. Decisions of the utmost authority, both in England and in this country, propound this doctrine as applicable to policies in the clearest terms. Chief Justice Parker, in his opinion in *Higginson v. Dall*, 13 Mass. 96, says that "policies, though not under seal, have, nevertheless, ever been deemed instruments of a solemn nature, and subject to most of the rules of evidence which govern in the case of specialties. The policy is itself considered to be the contract between the parties, and whatever proposals are made, or conversations had, prior to the subscription, they are to be considered as waived, if not inserted in the policy, or contained in a memorandum annexed to it." *Atherton v. Brown*, 14 Mass. 152, is, upon this point, of the same complexion, and has close pertinency to the case under consideration with respect to the application of the rule of evidence. The description was of property insured "on board the Spanish brig *New Constitution*," and the vessel was captured, and, with her cargo, was condemned as Ameri-

can property; and it was held that the description in the policy amounted to a warranty that the vessel was Spanish, and that it was not competent for the assured to show that the underwriters were informed, at the time of their subscription, that she was, in fact, an American vessel. The court said that parol evidence of what was within the knowledge of the underwriters was not admissible. The following are cases which establish the same proposition: *Vandervoort v. The Columbia Insurance Company*, 2 Caines' R. 155; *Weston v. Emes*, 1 Taunt. 115; *Parks v. General Int. Assur. Co.*, 5 Pick. 34; *Flinn v. Tobin*, 1 Mood. & Malk. 367; *Jennings v. The Chenango Mut. Ins. Co.*, 2 Denio, 75; Angell on Fire and Life Ins., §§ 20, 21.

There are several reported decisions which I do not think are distinguishable with respect to legal rules and their application, from the present. Among these is that of *Jennings v. The Chenango Mutual Insurance Company*, 2 Denio, 75. There the property insured was described as a "grist-mill," and it was proved that carpenters' work was accustomed to be done in it, with instruments and fixtures which were kept there. One of the principal questions in the case was whether it was competent to prove, that, at the time the application was made for this policy, the agent for the defendants was informed that these fixtures were in use in the mill. This proof was rejected, and the policy held void; the ground of rejection being the general rule of evidence, which places written instruments above the level of parol testimony. Quite as strong in favor of the same doctrine is the case of *Kennedy v. The St. Lawrence County Mutual Insurance Company*, 10 Barbour, 285. The application of the insured, which formed a part of the policy, described erroneously the buildings which were within a certain distance of the premises. Here the same circumstance was relied on as a defense which has been set up in the present case; namely, that the agent of the defendants had full knowledge of the situation of the premises and its neighborhood, and that he drew the application, and specified in it such buildings as he chose. This defense was overruled, and the defendants had judgment.

With respect to the case of *Plumb v. The Cattaraugus County Mutual Insurance Company*, 18 N. Y. 392, to which

we were referred by counsel, my answer is two-fold : first, that I cannot assent to the doctrine on which that judgment is founded ; and, in the second place, that doctrine, if correct, could have no application to the facts now under consideration.

In the case from New York here referred to, there was, in the application for the policy, a misdescription of the distance of the adjacent buildings from the premises insured, and to this defense the reply was, that the agent of the company had made the measurements, and had obtained the signature of the plaintiff on the assurance "that the application was all right, and just as it should be." The court decided that this declaration of the agent could not be offered for the purpose of altering or contradicting the written contract, but that it was admissible as an *estoppel in pais*. Now, it is at once obvious that, by force of that view, the agreement in question was enforced, not in the sense of the written terms, but in the sense of the oral evidence, and that the practical result was precisely the same as though the instrument had been reformed in conformity to such evidence at the trial. I think there is no doubt that this application of the doctrine of estoppel to written contracts is an entire novelty. In the long line of innumerable cases which have proceeded and been decided on the ground that parol evidence is not admissible as against a written instrument, no judge or counsel has ever intimated, as it is believed, that the same result could be substantially obtained by a resort to this circuitry. It is true that, if there be a substantial ground in legal principle for its introduction, the fact that it is new will not debar from its adoption ; but I have not been able to perceive the existence of such substantial ground. In my apprehension, the doctrine can be made to appear plausible only by closing the eyes to the reason of the rule which rejects, in the presence of written contracts, evidence by parol. That reason is, that the common good requires that it shall be conclusively presumed in an action at law, in the absence of deceit, that the parties have committed their real understanding to writing. Hence, it necessarily follows, that all evidence merely oral is rejected, whose effect is to vary or contradict such expressed understanding. Such rejection arises from the consideration that oral testimony is unreliable in comparison with that which is written. It is

idle to say that the estoppel, if permitted to operate, will prevent a fraud or inequitable result; most parol evidence contradictory of a written instrument has the same tendency; but such evidence is rejected not because, if true, it ought not to be received, but because the written instrument is the safer criterion of what was the real intention of the contracting parties. In the case now criticised, the party insured stipulated against the existence of buildings within a definite number of feet from the insured property; by the admission of parol testimony, this stipulation was restricted and limited in its effect. This result, no doubt, was strictly just, if we assume that the parol evidence was true; but, standing opposed to the written evidence, the law presumed the reverse. The alternative is unavoidable; it is a choice between that which is written and that which is unwritten. In the case cited, the effect of the rule adopted by the court was to give a different effect to the written terms from that which they intrinsically possessed, a result induced by the admission of oral evidence. This, I cannot but think, was a palpable alteration of the agreement of the parties. The mistake of the court appears to have been in regarding simply the legal effects of the facts which were proved by parol. Receiving that testimony into the case, a clear estoppel was made out; but the error consisted in the circumstance that such oral evidence was, on rules well settled, inadmissible. The question presented was purely one as to a rule of evidence, but it was treated as a problem relating to the application of general legal principles to an admitted state of facts. The case was not decided by a unanimous court; three judges dissented, and, in my judgment, that dissent was based on satisfactory grounds.

But it has been already observed, that, even if the doctrine of the adjudication should be received by this court, such result could have no effect on our decision of the present case. The reason is, that the facts now before us do not present the elements of an estoppel. Such a defense rests on a misconception as to a state of facts, induced by the party against whom it is set up. The person who seeks to take advantage of it must have been misled by the words or conduct of another. Now, in the present case, the agent did not make any statement nor did he do anything which led the plaintiff to alter his condi-

tion. The most that can be laid to his charge is, that from carelessness he omitted properly to describe the use of the premises insured. But this was not a misstatement of a fact on which the plaintiff acted, because the plaintiff was aware of the circumstance that the building was put to another use. The alleged error in the description is plain on the face of the policy, and the law incontestably charges the defendant with knowledge of the meaning and legal effect of his own written contract. Certainly the entire state of things was as well known to the plaintiff as it was to the agent of the defendants. To found an estoppel on the ignorance of the plaintiff of the plainly expressed meaning of his own contract, would be absurd.

Being of opinion that the plaintiff's case, on this first point, cannot stand, I have not thought it necessary to look into the other grounds of objection raised on the part of the defense.

CHAPTER VII.

GENERAL PRINCIPLES.

Waiver and Estoppel—Continued.

CONNECTICUT SUPREME COURT OF ERRORS, 1871.

COUCH v. CITY FIRE INS. CO.

(38 Conn. 181.)

*Essential provisions of the charter cannot be waived.*¹

ASSUMPSIT on a policy of insurance.

The twelfth section of the defendants' charter contained the following provision: "If there shall be any other insurance upon the whole or any part of the property insured by any policy issued by said company, during the whole or any part of the time specified in such policy, then every such policy shall be void, unless such double insurance shall exist by consent of said company, indorsed upon the policy under the hand of the secretary."

The defendants insured Mrs. Couch, one of the plaintiffs, on a dwelling-house and other property owned by her, by a policy containing a condition similar in substance to the above provision of the charter. At the time the policy was issued other insurance existed on the same property in the North American Fire Insurance Company, but the consent of the defendants to such other insurance was not indorsed upon the policy. The insured property having been destroyed by fire, this action was brought to recover the loss.

¹ The opinion of the court contains a good exposition of this principle, but the application of it made to the facts of this case would seem to be open to some question. *Cumberland Valley Mut. Prot. Ins. Co. v. Schell*, 29 Pa. St. 31; *Hoxsie v. Prov. Mut. Fire Ins. Co.*, 6 R. I. 517; *Fuller v. Boston Fire Ins. Co.*, 4 Met. (Mass.), 206; *Wilbur v. New England Mut. Fire Ins. Co.*, 31 Me. 219.

On the trial the plaintiffs claimed that it was competent for the defendants to waive the above conditions of the charter and the policy, by acts in parol, and introduced parol evidence to prove such waiver by the officers and agent of the company. The defendants objected to the admission of such evidence, but the court admitted it. The defendants also asked the court to charge the jury that it was not competent to prove the consent of the company to such double insurance by any other evidence than an indorsement of such consent upon the policy under the hand of the secretary, nor was it competent for the executive officers of the company, by any acts in parol, to waive a substantial compliance with the requirements of their charter in this respect, and in reference to this policy.

The court (Pardee, J.) charged the jury, that the question of waiver was for them upon all the evidence before them, and that, if the executive officers of the company had waived the right to require such evidence of consent, by any acts in parol which they should find proved in the case, or if they had authorized their agent, and he had so waived, then the company was bound, and was estopped by such acts and waiver, notwithstanding the charter and the conditions of the policy, and without such indorsement as was called for by the charter.

The jury returned a verdict for the plaintiffs, and the defendants moved for a new trial for a verdict against evidence, and for errors in the rulings and charge of the court.

PARK, J.—There was double insurance in this case at the time this policy was issued, and the consent of the company thereto was not indorsed upon the policy. The charter therefore declares the policy void, and it is void unless the twelfth section is of such a character that its provisions can be waived by the defendants.

If this provision was made solely for the benefit of the defendants, there might be force in the claim of the plaintiffs that it could be waived, on the ground that what is exclusively for the benefit of a person, either natural or artificial, is for him to enjoy or not as he pleases; and if he chooses to forego the benefit, he has a right to do so, as no one but him is interested in the matter. But we think the defendants are not solely interested in this provision of the charter. It was made

to guard against the danger of over-insurance. It is well known that over-insurance encourages incendiary fires ; and insurers are therefore extremely careful not to insure property to the full amount of its value, but leave the assured to be himself the insurer of a part thereof, that he may have a common interest with them in the preservation of the property. The eleventh section of the defendants' charter, as well as the one under consideration, shows what solicitude the legislature entertained upon this subject, and the great care they exercised to prevent this evil.

Such being the tendency of over-insurance, it is manifest that it endangers not only the welfare of insurers, but the welfare of all their policy-holders, who have a deep interest in their solvency in case of loss by fire. Insurance companies insure property to an amount many times their capital, and it may easily happen that a few fraudulent incendiary fires scattered over the country should involve them and their policy-holders in heavy and perhaps ruinous losses. But the evil of over-insurance does not stop here. Everywhere insured property is mingled indiscriminately with property not insured. The burning of the insured property burns the other also ; and every year vast amounts of property not insured go to destruction in consequence of the over-insurance of property in its neighborhood. Surely the welfare of such owners should be considered by legislatures, and provision should be made for them when corporations like these are created. It is to be considered also that the welfare of the State, which has an interest in all the property of the State, requires that this should be done.

One great source of this evil is the insurance of the same property by different companies, when each company is not aware of the act of the other. To prevent this evil, as far as may be, in the present case, we think the legislature inserted the twelfth section in the defendants' charter, intending thereby to put it out of the power of the defendants to insure property otherwise than is provided therein.

The evil could not be successfully reached by merely requiring the *consent* of the company to such further insurance. There would be no security from misunderstanding, misremembrance, and fraud. The difference is great between leaving the

consent of the company to be proved by the vagueness and uncertainty of parol evidence, and requiring it to be shown by a formal indorsement upon the policy under the hand of their secretary, which could not be made without consideration and deliberation on the one hand, and certainty of the fact on the other. *Hale v. Mechanics' Mut. Fire Ins. Co.*, 6 Gray, 169.

This difference is all-important in a case like this; and, indeed, if mere consent was all that the legislature intended by the twelfth section of this charter, then no object was accomplished, or could be accomplished, by inserting it in the charter; for if the defendants should make an absolute contract of insurance, without any condition that it should become void if there was or should be further insurance on the property by any other company, during the whole or any part of the time covered by the policy, they would be taken by jurors as having given consent in advance to such further insurance; or the mere fact of such absolute contract would be sufficient evidence with them of a waiver of the condition. It would be urged that the plaintiff was ignorant of the provisions of the charter, and, if the defendants intended to make it a part of the contract, they would have informed the plaintiff by inserting it in the policy. Thus, in order to make it a part of the contract, it would have to be inserted in the policy of insurance, whether it was embodied in the charter or not; and, if inserted in the policy, it would have all the effect that the charter could give it, if the legislature intended no more by this provision than mere consent. We think, therefore, that the legislature had more than this in view, and intended to limit the power of the company in the matter.

If, then, the twelfth section must have such construction, manifestly it could not be waived by the defendants, or departed from in any essential particular; for, in the language of Chief Justice Marshall, in the case of *Head v. Providence Ins. Co.*, 2 Cranch, 127, "the act of incorporation is an enabling act; it gives the corporation all the power it possesses; it enables it to contract, and when it prescribes to it a form of contracting it must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." Phillips on Insurance (vol. i. p. 9) says an incorporated insurance company "is the mere creature of the act to

which it owes its existence, and may be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exercising them only in the manner which that act authorizes." See also *New London v. Brainard*, 22 Conn. 552; *Occum Co. v. Sprague Manufacturing Co.*, 34 Conn. 529; *Hood v. New York & New Haven R.R. Co.*, 22 Conn. 502.

We think, therefore, that it was not competent for the plaintiffs to prove the consent of the defendants to the double insurance on the plaintiffs' property by any other evidence than an indorsement of such consent on the policy under the hand of the secretary of the company, and that the jury should have been so instructed.

In this opinion the other judges concurred; except FOSTER, J., who dissented.

New trial.

UNITED STATES SUPREME COURT, 1877.

UNION MUTUAL LIFE INS. CO. v. MOWRY.

(96 U. S. 544.)

An oral promise of the insurers or their agent, made at the time of or before the contract, will not operate as an estoppel or waiver, and cannot be shown to contradict the policy.

Action upon a policy of insurance of which the concluding clause is as follows: "But the same [the policy] shall not be binding until countersigned and delivered by John Shepley, agent, at Providence, R. I., nor until the advance premium is paid."

There was a verdict for the plaintiff; and, judgment having been rendered thereon, the defendant sued out this writ of error.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action on a policy of insurance, issued by the Union Mutual Life Insurance Company, a corporation created under the laws of Maine, upon the life of Nelson H. Mowry, for the sum of \$10,000. The insurance was effected by (the plaintiff) a nephew of the insured, for his sole benefit. The

nephew was at the time a creditor of the insured to the extent of \$6,000, and had agreed to embark with him in an enterprise requiring the expenditure of considerable capital, and depending for its success upon the knowledge and skill of the insured in business. These circumstances gave the nephew such an interest in the life of the insured as to prevent the policy from being a wager one. The insurance effected was from the 9th of March, 1867, and the policy recited the payment of the first annual premium on that day, and stipulated for the payment of the subsequent premiums on the same day of that month each year. The payment of the insurance money, after notice and proof of the death of the insured, was made dependent upon the punctual payment, each year, of the premium. The policy, in terms, declared that it was made and accepted by the insured and the nephew, upon the express condition that if the amount of any annual premium was not fully paid on the day and in the manner provided, the policy should be "null and void, and wholly forfeited." And it declared that no agent of the company, except the president and secretary, could waive such forfeiture, or alter that or any other condition of the policy.

The second premium, due on the 9th of March, 1868, was not paid, and the insured died on the 8th of April following. Forty-five days after it was due, and fifteen days after the death of the insured, this premium was tendered to the company, and was refused. The question for determination is, whether a tender of the premium at that time was sufficient to hold the company to the payment of the insurance money.

By the express condition of the policy, the liability of the company was released upon the failure of the insured to pay the premium when it matured; and the plaintiff could not recover, unless the force of this condition could in some way be overcome. He sought to overcome it by showing that the agent who induced him to apply for the policy represented to him, in answer to suggestions that he might not be informed when to pay the premiums, that the company would notify him in season to pay them, and that he need not give himself any uneasiness on that subject; that no such notification was given to him before the maturity of the second premium, and for that reason he did not pay it at the time required. This rep-

resentation before the policy was issued, it was contended in the court below, and in this court, constituted an estoppel upon the company against insisting upon the forfeiture of the policy.

But to this position there is an obvious and complete answer. All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, was there expressed for the very purpose of avoiding any controversy or question respecting them. The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If, by inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company.

The previous representation of the agent could in no respect operate as an estoppel against the company. Apart from the circumstance that the policy subsequently issued alone expressed its contract, an estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact—to a present or past state of things. If the representation relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances of which neither party can have any certain knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made.

The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect, if a party, who, by his statements as to matters of

fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine carried to the extent for which the assured contends in this case would subvert the salutary rule that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent. *White v. Ashton*, 51 N. Y. 280; *Bigelow, Estoppel*, 437-441; *White v. Walker*, 31 Ill. 422; *Faxton v. Faxton*, 28 Mich. 159.

The learned judge who tried this case in the circuit court instructed the jury, in substance, that if they could find from the language of the agent that there was an agreement between him and the assured, made before the policy was executed, that the latter should have notice before he should be required to pay the annual premium, then that the company, not having given such notice, was estopped from setting up the forfeiture stipulated by the policy for non-payment of the premium when due. For the reasons we have stated, we think the court erred in this instruction.

There is nothing in the record which shows that the agent was invested with authority to make an insurance for the company. In representing himself as an agent, he only solicited an application by the assured to the company for a policy. That instrument was to be drawn and issued by the company, and it shows on its face that the authority to the agent was limited to countersigning it before delivery and to receiving the premiums. But even if the agent had possessed authority to make an insurance for the company, and he made the agreement pretended, still the assured was bound by the terms of the policy subsequently executed and accepted by him.

The judgment must be reversed, and the cause remanded for a new trial ; and it is

So ordered.

NEW YORK COURT OF APPEALS, 1889.

LANDERS v. COOPER.

(115 N. Y. 279.)

A new subject-matter of insurance cannot be substituted by the doctrine of waiver and estoppel.

Appeal from judgment of General Term of Supreme Court in favor of plaintiff.

This action was upon a policy of insurance issued by the Watertown Fire Insurance Company, of which company the defendant is receiver, to the plaintiff, upon his "two-story dwelling-house."

ANDREWS, J.—Two defenses are relied upon : *first*, that the building burned was not the building mentioned in the application and survey, and insured by the policy ; and, *second*, that when the policy in question was issued, there was a prior insurance on the building destroyed, in the Glens Falls Insurance Company, not consented to by the Watertown Fire Insurance Company, whereby, by the terms of the policy sued upon, it became void. The defendant, to establish the first defense, relied upon the following facts : (1) The policy, by its language, insures Landers in the sum of \$800 "on the property described in the application and survey bearing even date therewith, and which is hereby referred to as forming a part of the policy ; viz., \$800 on his (Landers) two-story dwelling-house, Afton, N. Y." (2) The application on which the policy was issued describes the property to which the application relates as situated in Afton, N. Y., and being a tenant-house, two stories high, sixteen by twenty-four with wing sixteen by twenty-four, with two chimneys, and located sixty feet south of the dwelling-house of Landers (the applicant), and sixty feet west of a barn. This is an accurate description of the tenant-house near the dwelling-house of Landers, with the exception that its height is one and a half stories, and not two stories. (3) On the back of the application is a survey and diagram showing the dwelling-

house, the tenant-house (consisting of a main part and wing), and the barn, their relative positions; and under the tenant-house is the word "risk." (4) The mill-house (the house burned) was situated half a mile from the dwelling-house of Landers, and was also a tenant-house. It was a building two stories high, twenty by thirty feet in size, without any wing, and having but one chimney. It was distant, at the nearest part, thirty-seven feet from a steam mill of Landers. It corresponded in no respect with the building described in the application and survey with the single exception of height. (5) The application and survey were forwarded by Cannon, the agent, to the office of the company at Watertown, and the policy was issued thereon and mailed by the company to Landers. The company had no information as to the risk, or of any negotiations between Cannon and Landers other than was disclosed by the application.

The plaintiff, notwithstanding this apparently conclusive evidence that the house insured was the tenant-house and not the mill-house, has recovered for the loss by fire of the mill-house, upon certain extrinsic proof submitted to the jury. It was shown that Landers, prior to the issuing of the policy in question, held two policies of insurance in the Glens Falls Insurance Company, of \$800 each—one on the tenant-house (near his dwelling-house) expiring July 1, 1873, and one on the mill-house expiring May 1, 1874—each for three years at the same rate of premium. The local agent of the Glens Falls Insurance Company, in the spring or summer of 1873, removed and sold out his business to Cannon, the local agent of the defendant's company, who transferred to him, among other things, an "expiration book," in which the two policies to Landers were entered—one entry being, "Thomas Landers, Glens Falls; number of policy, 197; property, Afton, \$800; premium, \$4.80; expiring 1st of July, 1873," and the other, "Thomas Landers, Glens Falls Insurance Company; number, 351; farm property in Afton, \$800; premium, \$4.80; rate, 60c.; expiring the 1st of May, 1874." It will be noticed that the entries do not show on their face to what particular building they severally apply. The plaintiff's version of the circumstances which preceded the issuing of the policy in question is, substantially, that the agent Cannon in the spring of 1873 met

Landers informed him that the policy on the mill-house was about expiring, and asked him if he did not want it renewed, stating that the former agent of the Glens Falls Company had left, and he (Cannon) had his papers and was doing his business, and that he was the agent of the Watertown Fire Insurance Company, which was a good company, and solicited Landers to take a policy in that company, to which he finally consented. The testimony of Landers to the point that the negotiation with Cannon related to a renewal of the policy on the mill-house is corroborated, to some extent, by other members of his family. The policy which expired in July, 1873, was the policy on the tenant-house. The policy on the mill-house did not expire until May, 1874. It was the policy on the tenant-house which needed to be renewed, and not the policy on the mill-house. But Landers relied, as he claimed, on the assurance of Cannon that it was the policy on the mill-house which would expire first, and thereupon authorized him to procure a new insurance upon that building. Within a short time after the conclusion of the negotiation, Cannon made out the application and survey, and signed the name of Landers to the application, and forwarded them to the defendant. The application and survey, as has been shown, related to the tenant-house and not to the mill-house. Cannon, on the trial, contradicted the testimony of Landers and his witnesses as to the fact that the negotiation between himself and Landers related to the mill-house, and testified that the tenant-house was pointed out by Landers as the one upon which the policy was about to expire, and that the proposition on his part to procure a new policy related to the tenant-house and not to the mill-house. Upon this state of facts and the additional fact testified to by Landers, that he did not authorize Cannon to sign any application, and that he had no knowledge of the application or survey until after the fire, the court submitted to the jury to find whether the application was authorized by Landers, and instructed them that if it was made without his authority or knowledge, and he did not know of the representations therein, they should disregard the application and survey, and determine the case upon the point whether the negotiation between Landers and Cannon related to the mill-house, and instructed them, in substance, that if

they found that it did relate to the mill-house, and not to the tenant-house, the policy covered the mill-house, and the plaintiff was entitled to recover. The defendant, before the submission of the case to the jury, moved that the case should be dismissed on the grounds, among others, that the policy did not cover the mill-house, but the tenant-house, and that, assuming the policy covered the mill-house, there was a prior existing insurance thereon not consented to by the defendant.

We think the case was tried and submitted to the jury upon an erroneous view of the law. The action was brought distinctly and solely upon the policy of August 1, 1873, and to enforce the contract of insurance contained in that instrument. The building burned was the mill-house, and unless the policy was upon that building the plaintiff did not establish the cause of action alleged in the complaint. The subject of the insurance is to be ascertained from the description in the policy and such extrinsic evidence as may be necessary to identify the property described. But extrinsic evidence which goes beyond the purpose of aiding in the interpretation of the written contract, and tends to show that the subject thereof was other and different from that described in the written instrument—that is to say, in this case, that the building intended to be insured was the mill-house, although not the building actually covered by the policy—while it might tend to establish a case for the reformation of the contract, would be inadmissible to sustain an action to enforce the contract as written, as though it applied to the building intended to be covered, but not described in the policy. The policy was issued upon a written application and survey made by Cannon, the local agent of the company, in the name of Landers, and forwarded by the agent to the main office of the company. The company approved the application and thereupon issued and mailed the policy to Landers. It must be assumed upon the finding of the jury that the negotiation between Cannon and Landers related to an insurance on the mill-house and not on the tenant-house; and, further, that the agent in making the written application and signing Landers' name thereto, and in making the survey and diagram of the premises, acted without Landers' authority, and that Landers had no knowledge of the representations made by the agent to the company until after the fire.

The evidence leaves no possible room for question that the company, when it issued the policy, intended to insure the tenant-house, and not the mill-house. Nor can there be any doubt that the policy describes the tenant-house, and not the mill-house, as the subject insured. It is quite impossible to treat this policy as a contract insuring the mill-house, if the application and survey are considered in ascertaining the subject of insurance. It is only by rejecting them that the subject is left in any possible doubt. This the trial court permitted the jury to do upon the theory that the representations in the application and diagram were the unauthorized acts of the agent, and were not, therefore, binding upon Landers. In substance, the court permitted the jury to strike from the written part of the policy the clause referring to the application and survey, and to regard only the words, "\$800 on his (Landers) two-story dwelling-house," which, standing alone, describe with sufficient accuracy the mill-house, and then to find that the policy was one upon the mill-house, as the agent Cannon and Landers intended.

The court treated the case as analogous (1) to those which hold that a contract of insurance is not defeated by a misrepresentation as to some fact material to the risk, or made so by the terms of the contract, contained in an application prepared by the agent in the name of the insured, but without his authority, and upon which the company acted in issuing the policy. *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 496; *Sprague v. Holland Purchase Ins. Co.*, 69 id. 128; *Vilas v. N. Y. C. Ins. Co.*, 72 id. 590; *Ames v. N. Y. Union Ins. Co.*, 14 id. 253. (2) To the class of cases where the agent, having been authorized by the insured to fill out the application in his name, misstated, by mistake or inadvertence, the information given by the insured, and thereby misled the company. *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Baker v. Home Life Ins. Co.*, 64 id. 648; *Grattan v. Metropolitan Life Ins. Co.*, 92 id. 274; *Bennett v. Agricultural Ins. Co.*, 106 id. 243. (3) To the cases which hold that a company cannot insist upon a condition declaring the contract to be void if a certain fact or situation exists not represented to the company and indorsed on the policy, provided the company or its authorized agent knew the fact or situation relied upon to defeat the contract at the time the

contract was made. *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434; *Richmond v. Same*, 79 id. 230; *Short v. Home Ins. Co.*, 90 id. 16. In none of these cases was there any question as to the subject of the insurance. In all of them it was conceded that the policy covered the building or property destroyed by the fire. The matters alleged as constituting a defense related to some incident of the contract or to the performance of some condition collateral to the express object of the contract. In cases falling within the two classes of cases first mentioned, the fault was committed by the agent of the defendant, and it is held, that, as between the company and the insured, the company should bear the loss. In cases of the third class, it is held that it could not have been the intention that the policy should be defeated by reason of an omission to communicate facts known to the company when the contract was made, or the failure to have the written recognition of the company of their existence. The courts in these cases apply the doctrine of waiver or estoppel to prevent fraud or injustice.

But the principle which relieves the party insured from responsibility for unauthorized representations made by the agent of the insurer in respect to some incident of the risk, and permits them to be disregarded in an action to enforce the contract, has no application where the point in issue is as to the subject of the insurance, and the contract is explicit upon that point. If the contract of insurance relates to one definite and distinct subject, it cannot be turned into a contract for the insurance of another and different subject on proof that the agent of the company, by mistake, described the wrong property in his application. The agent's authority here was to "make surveys and take applications for insurance." He had no authority to enter into contracts of insurance in behalf of the company. The company passed upon the applications and accepted or rejected them in its discretion. In determining the question whether the policy issued covered the mill-house or the tenant-house, the papers on which the company acted were material evidence. In ascertaining to which subject the policy applied, it is immaterial whether the application was made by the authority of the insured or not, or whether it was genuine or forged. There must be a meeting of minds between the parties to a contract before a contract is formed. If the

facts show that the company intended to insure the tenant-house, and the written contract applies to that house, the plaintiff cannot recover in this action, although he may have intended to procure an insurance on the mill-house, and by the agent's fault the application was made to refer to the tenant-house. If there is any remedy against the company for the mistake or carelessness of the agent, it is not available in an action to enforce a contract relating to one subject, as if it were a contract relating to another subject. I am not aware of any principle in the law of estoppel which prevents the defendant from showing that the contract relates to the tenant-house, or which justifies the court in excluding from the consideration of the jury, in the determination of the issue, the application and survey upon which the company acted, because made without the authority of the insured by the company's agent. We are of opinion that the defense, that the policy was not upon the mill-house, but was upon the tenant-house, was clearly established, and that upon this ground a nonsuit should have been granted.

All concur.

Judgment reversed.

CHAPTER VIII.

GENERAL PRINCIPLES.

Authority of Agents of the Company to Waive and Estop as Affected by Stipulations in the Policy Restricting their Authority.

MINNESOTA SUPREME COURT, 1883.

KAUSAL v. MINNESOTA FARMERS' MUT. FIRE
INS. ASSO.

(31 Minn. 17.)

Effect of stipulation in the policy that soliciting agent is not agent of the insurers.

ACTION to recover upon a policy of fire insurance, issued to husband and wife jointly, upon a certain house and furniture in which they allege that they had an insurable interest, and which were subsequently destroyed by fire. The policy contained a stipulation that the soliciting agent should be deemed the agent of the assured. The answer of the defendant admits the issuance of a joint policy to the plaintiffs, alleges that the same was issued in reliance upon the statements and answers contained in the application, which the plaintiffs agreed should be warranties on their part; that "in and by such policy it is provided that any misrepresentation by the assured of the value, condition, situation, title, or occupancy of the property, or any omission to make known every fact material to the risk, or any misrepresentation whatever, or fraud, or attempt at fraud, whether in written application or otherwise, shall cause a forfeiture of all claims under the policy," and "that if the interest of the assured be not truly stated, then the policy shall be null and void." The answer further alleges that in their application the plaintiffs stated that the dwelling-house

described was completed and painted, and that such statement was false.

The reply alleges that the plaintiffs "are foreigners, and ignorant of the English language, and did not know what was contained in the application for insurance mentioned in said answer; that the same was made out by an agent of the defendant, and plaintiffs signed the same by his direction, without knowing the contents of the same. The reply admits "that said house was not completed or painted," but alleges "that at the time the said application was made an agent of defendant, duly authorized to solicit insurance and to take and receive applications therefor on the part of the defendant, was present at the said house so insured, and examined the same, and fully knew all the circumstances of its condition, and solicited said insurance, and wrote out said application as aforesaid, and told the plaintiffs the same was correct, and induced them to sign the same." The reply denies all other allegations than those above admitted.

On the trial before Young, J., and a jury, the defendant objected to the reception of any evidence on the part of the plaintiffs, on the ground that it is incompetent, irrelevant, and immaterial under the pleadings, which objection was sustained. The plaintiffs then offered to prove all the allegations of the reply, which offer was rejected, and the action was dismissed. Plaintiffs appeal from an order refusing a new trial.

MITCHELL, J.—1. On principle, as well as for considerations of public policy, agents of insurance companies, authorized to procure applications for insurance, and to forward them to the companies for acceptance, must be deemed the agents of the insurers and not of the insured in all that they do in preparing the application, or in any representations they may make to the insured as to the character or effect of the statements therein contained. This rule is rendered necessary by the manner in which business is now usually done by the insurers. They supply these agents with printed blanks, stimulate them by the promise of liberal commissions, and then send them abroad in the community to solicit insurance. The companies employ them for that purpose, and the public regard them as the agents of the companies in the matter of preparing and

filling up the applications—a fact which the companies perfectly understand. The parties who are induced by these agents to make applications for insurance rarely know anything about the general officers of the company, or its constitution and by-laws, but look to the agent as its full and complete representative in all that is said or done in regard to the application; and, in view of the apparent authority with which the companies clothe these solicitors, they have a perfect right to consider them such. Hence, where an agent to procure and forward applications for insurance, either by his direction or direct act, makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer and not to the insured. *Ins. Co. v. Mahone*, 21 Wall. 152; *Ins. Co. v. Wilkinson*, 13 Wall. 222; *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465; *Hough v. City Fire Ins. Co.*, 29 Conn. 10; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; *Winans v. Allemania Fire Ins. Co.*, 38 Wis. 342; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Brandup v. St. Paul F. & M. Ins. Co.*, 27 Minn. 393; 2 Am. Lead. Cas. (5th ed.), 917 *et seq.*; Wood on Insurance, c. 12; May on Insurance, § 120.

2. After the courts had generally established this doctrine, many of the insurance companies, in order to obviate it, adopted the ingenious device of inserting a provision in the policy, that the application, by whomsoever made, whether by the agent of the company or any other person, shall be deemed the act of the insured and not of the insurer. But, as has been well remarked by another court, “there is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of facts.” If corporations are astute in contriving such provisions, courts will take care that they shall not be used as instruments of fraud or injustice. It would be a stretch of legal principles to hold that a person dealing with an agent, apparently clothed with authority to act for his principal in the matter in hand, could be affected by notice, given after the negotiations were completed, that the party with whom he had dealt should be deemed transformed from the agent of one party into the agent of the other. To be efficacious, such notice

should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter. To hold that, by a stipulation unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent, would be to impose burdens upon the insured which he never anticipated. Hence, we think that if the agent was the agent of the company in the matter of making out and receiving the application, he cannot be converted into the agent of the insured by merely calling him such in the policy subsequently issued. Neither can any mere form of words wipe out the fact that the insured truthfully informed the insurer, through its agent, of all matters pertaining to the application at the time it was made. We are aware that in so holding we are placing ourselves in conflict with the views of some eminent courts. But the conclusion we have reached is not without authority to sustain it, and is, we believe, sound in principle, and in accordance with public policy. Wood on Insurance, § 139; May on Insurance, § 140; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331.

3. It is contended by respondent that there is a distinction in this regard between "stock" and "mutual" insurance companies; that the difference in the character of the companies makes a difference in the relative duties of the applicant and the company, and in the authority of the agents employed; that, in the case of a mutual company, the application is in effect not merely for insurance, but for admission to membership—the applicant himself becoming a member of the company upon the issue of the policy. By some courts a distinction in this respect is made between the two classes of companies. This distinction is usually based upon the ground that the stipulations held binding upon the insured are contained in the charter or by-laws of the company, and that a person applying for membership is conclusively bound by the terms of such charter and by-laws. Such is not this case, for the stipulations claimed to bind the insured are only in the policy. But, so far as concerns the questions now under con-

sideration, we fail to see any distinction between the two kinds of companies, and we feel confident that the average applicant for insurance is rarely aware of any. It is true that, in the case of a mutual company, the insured becomes in theory a member of the company upon the issue of the policy. But, in applying and contracting for insurance, the applicant and the company are as much two distinct persons as in the case of a stock company, and we see no reason for holding the agent who takes the application any less the agent of the insurer in the one case than in the other. The membership does not begin until the policy is issued. As to all previous negotiations, the agent acts only for the company. *Columbia Ins. Co. v. Cooper, supra*; May on Insurance, §§ 139 *et seq.*

4. Verbal testimony is competent to show that the application was filled up by the agent of the company, and that the facts were fully and correctly stated to him, but that he, without the knowledge of the insured, misstated them in the application. This was not in violation of the rule that verbal testimony is not admissible to vary a written contract. It proceeds upon the ground that the contents of the paper were not his statement, though signed by him, and that the insurance company, by the acts of their agent in the matter, are estopped to set up that it is the representation of the insured. *Ins. Co. v. Wilkinson, supra*; May on Insurance, § 143, and cases cited, note 3.

At the time the application for this insurance was made, defendant's agent, authorized to take such applications, was personally present on the premises, and was first fully informed by the plaintiffs of all the facts, and then himself wrote out the application, and told William Kausal that it was correct. William Kausal then signed it, and also signed his wife's name thereto, upon the statement and representation of the agent that such was the proper mode of making the application.

On this state of facts, if the policy does not cover the loss, it is the fault of the defendant and not of the plaintiffs. It seems clear that plaintiffs are not without remedy.

Order reversed.

NEW YORK COURT OF APPEALS, 1890.

MESSELBACH V. NORMAN.

(122 N. Y. 578.)

The limitation in the policy in respect to the agent's power to waive or estop is prima facie binding, and must be overcome by proof of an actual or ostensible authority sufficiently broad, before a waiver or estoppel can be established.

FOLLETT, CH. J.—June 9, 1883, the defendant insured the plaintiff against such loss or damage, not exceeding \$1,500, as should be caused by fire, during the next three years, to a building then in process of erection, which, when completed, was to be occupied as a dwelling. The policy contained, among others, the following provisions :

“This policy shall become void, unless consent in writing is indorsed hereon by or on behalf of the society, in each of the following instances, . . . if any building hereby insured be or become vacant or unoccupied for the purpose indicated in this contract.”

The building was finished August 1, 1883, and thereafter was occupied as a dwelling by a tenant until April 17, 1884, when he left, and the building remained unoccupied until April 26, 1884, when it was totally destroyed by fire. The building was unoccupied within the meaning of the policy. *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165. No written consent was indorsed on the policy that it should continue in force while the building was unoccupied, and it is conceded that no recovery can be had unless the evidence establishes a waiver of this provision. Undoubtedly, a party to a contract which contains a provision that it shall not be changed except by a writing signed by him may by conduct estop himself from enforcing the provision against a party who has acted in reliance upon the conduct; and so the acts of an agent who possesses the power of the principal, or who has been held out by the principal to possess his power in respect to the provision alleged to have been altered or changed, may also estop his principal. But under a policy containing a provision that the insurer “shall not be bound . . . by any act of or statement made . . . by any agent . . . which is not authorized by this policy or contained therein, or in any written paper mentioned

therein," the power can only be exercised in the mode prescribed, unless it is shown that the agent possessed, actually or apparently, the power of his principal in respect to the provision alleged to have been waived. *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5; *Marvin v. Universal Life Ins. Co.*, 85 id. 278.

Upon the question of waiver the plaintiff testified: "When Mrs. Jones, the tenant, moved out of the building I went and saw Mr. Bennett (the agent of defendant) right away. Q. What did you say to him? A. I told Mr. Bennett the tenant wanted to go out, and I want to move in myself; he said all right. . . . Q. What, if anything, did you say to the agent about the property being vacant, and about the policy of insurance? A. I told him the folks had gone out, and I would go in a few days; he said all right; he did not say anything about the policy or the insurance. Bennett told me when he gave me the policy to notify him if the people were moving out; I did not say anything else to him." The plaintiff's son-in-law testified: "Q. What have you heard him (Bennett) say, in relation to the policy in suit, in reference to Mrs. Jones moving from the premises? A. I heard Bennett say, in Amsterdam, that he told plaintiff that he was going to have business in Schuyler Street, and would stop and fix her policy so that it would be all right, providing it was vacant; he said he told her this the same day she notified him the family were going to move out." This is the only evidence tending to establish a waiver. The referee did not find, as a question of fact, that there was a waiver of any of the provisions of the policy; but simply found that the conversations above quoted were had, and decided, as a question of law, that they constituted a valid waiver. This conclusion is open to two objections: (1) It violates the following provision of the policy: "The use of general terms, or anything less than a distinct, specific agreement, clearly expressed and indorsed on the policy, shall not be considered as a waiver of any printed or written condition expressed therein." (2) There is no evidence that Bennett had power to waive by conduct or in any way, except as specified in the policy, any of its provisions. The evidence in respect to the terms of Bennett's agency is very meager and general in its character. The plaintiff testified that the policy

was delivered by "Lyman Bennett, defendant's agent." The policy was countersigned by "Lyman Bennett, agent;" and a consent indorsed on it, when issued, that the building be finished without extra charge, was signed "Lyman Bennett, agent," which is all the evidence from which the extent of his powers can be ascertained. There is no finding describing the extent of his powers or the character of his agency, whether it was general or special. Such a record is quite insufficient to justify this court in holding, as a matter of law, that Bennett possessed the powers of the principal in respect to the provisions under consideration, or any powers except such as he was shown to have exercised. The burden of showing that Bennett possessed the powers of the principal was, under the terms of the policy, upon the plaintiff, which she failed to sustain. No legal waiver of the provision in respect to unoccupancy having been established, the plaintiff was not entitled to recover.

The order should be affirmed, and judgment absolute rendered against the appellant, with costs.

All concur.

Order affirmed.

UNITED STATES SUPREME COURT, 1877.

KNICKERBOCKER LIFE INS. CO. v. NORTON.

(96 U. S. 234.)

To overcome the restriction of the policy in respect to the agent's power to waive, an actual or ostensible authority emanating from the principal must be shown to exist, and this depends largely upon the circumstance of each case, concerning the effect of which judges may easily differ.

This action was brought by Phoebe A. Norton on a policy of insurance, issued by the Knickerbocker Life Insurance Company of New York, on the life of Jesse O. Norton, for the benefit of his wife and children. The policy contained the following condition: "If the said premium shall not be paid on or before twelve o'clock, noon, on the day or days above mentioned for the payment thereof, at the office of the company in the city of New York (unless otherwise expressly agreed in writing), or to agents when they produce receipts signed by the president or secretary, or if the principal or interest upon any note or other obligation given for the premium upon said

policy shall not be paid at the time the same shall become due and payable, then, and in every such case, the company shall not be liable to pay the sum assured, or any part thereof; and said policy shall cease and be null and void."

By an indorsement on the policy, it was declared that "agents of the company are not authorized to make, alter, or abrogate contracts, or waive forfeitures."

The insured died on the 3d of August, 1875; and the company refused to pay the insurance, on the ground that the policy was forfeited by reason of the non-payment of certain notes given for the last premium, which was due April 20, 1875. It was conceded that all the other premiums had been paid.

The declaration, besides a special count on the policy, contained the ordinary money counts. The defendant pleaded the general issue, and, specially, that the premium notes were not paid at maturity, and that the policy thereby became forfeited. The plaintiff replied, first, that the agent of the defendant at Chicago, regularly authorized by the defendant so to do, extended the time of payment of the first note, which became due on the 20th of June, to the 20th of July, when she tendered the amount thereof to the agent, who refused to receive the same; and that she also tendered the amount of the second note at its maturity, which was likewise refused; secondly, that after the maturity of the first note, the agent of the defendant, regularly authorized so to do, waived all advantages the company might have claimed because of its non-payment at maturity, and extended the time of payment, as before stated, with an averment of tender and refusal. The defendant, by way of rejoinder, denied that it had extended the time of payment, or that it had waived any advantages as alleged. This was the issue at the trial.

It appeared on the trial that the premium in question was settled by the payment of \$50 in cash, and the balance in two promissory notes given by Jesse O. Norton to the insurance company; payable respectively in two and three months, and maturing, one on the 20th of June, the other on the 20th of July, 1875. Each note contained a clause declaring that if it were not paid at maturity the policy would be void—this being the usual form of premium notes.

On the issue as to extension of time on the notes, and the authority of the agent to grant it, the plaintiff produced three witnesses—Randall, agent of the company down to March, 1874; Frary, his successor, who was agent at the time in question; and Martin Norton, son of the insured, who acted in behalf of his father in reference to the alleged extension, and to the tender of payment.

The testimony of these witnesses tended to show that formerly the company had allowed their agent to extend time on premium notes for a period of ninety days; that this indulgence was afterwards reduced to sixty days, and then to thirty; and that, at the period in question, the agent was required, as a general thing, to return the notes in his hands if not paid by the 15th of the month following that in which they became due.

As to what took place with reference to the notes in question, there is some conflict in testimony between Martin Norton and the agent Frary. The former testified, in substance, that he called on the agent, in behalf of his father, in June, 1875, a few days after the first note became due, and told him that his father wished it extended for thirty days; to which the agent agreed—his answer being, "All right." That he called again on or about the 8th of July, to request an extension of the other note, which would become due on the 20th of that month, and a further extension of the first note to the 10th of August. That the agent said he would have to write to the company about this. That, on the 13th, he called again, and told the agent that his father had concluded to pay both notes; and the agent gave him the figures, showing what was due on them. That he called again on the 15th, prepared to pay the notes, when he was informed by the agent that he could not receive the money, having received orders from the company to return all the papers to New York, and he had done so. That he then made a legal tender of the amount due on the first note, which was refused. Frary testified that he had no recollection of the first interview, or of agreeing to extend the first note. As to the rest, they did not materially differ.

In addition to the testimony relating to the general practice of the agents in granting extensions of time for the payment of premium notes, evidence was given tending to show that

Norton, the insured, had usually received more or less indulgence of that kind.

The counsel for the defendant moved to strike out the testimony touching the usages of the company as to non-payment of prior premium notes by Norton, and prior indulgence thereon to him, as incompetent, and in conflict with the terms of the policy, and as showing no authority in Frary to give the alleged extension; which was without consideration, if made, and after the forfeiture had occurred.

The counsel for the defendant also moved to strike out that portion of Martin Norton's testimony relative to an agreement for an extension of the premium notes, such agreement being without authority on the part of the agent, etc. The court overruled the latter motion; and, as to the first, directed the jury to disregard so much of Randall's testimony as tended to show the conduct of the defendant and plaintiff in regard to former payments; but allowed to stand so much of Randall's and Frary's testimony as tended to show the powers of the agents in reference to giving extensions on premiums or premium notes. This ruling was excepted to.

In charging the jury, the court left it to them to say, from the evidence, whether the agent of the defendant had power to waive a strict compliance with the terms of the agreement as to the time of paying the notes given for the premium; and, if he had such power, whether such a waiver was in fact made: if it was, and if the insured offered to pay the notes within the time to which they were extended, and the company refused to receive payment, that then the plaintiff was entitled to recover. The jury were further instructed that the power vested in Randall, the previous agent, was only pertinent as it tended to throw light on the powers vested in his successor, Frary. The defendant's counsel excepted to the charge, and submitted several instructions, the purport of them being, in substance, that, in view of the express provisions of the policy, the evidence was utterly irrelevant and incompetent to show any authority in the agent to grant any indulgence as to the time of paying the notes, and to waive the forfeiture incurred by their non-payment at maturity; or to show that any valid and legal extension was, in fact, granted, or that the forfeiture of the policy was waived.

These instructions were refused. There was a judgment for the plaintiff, whereupon the company sued out this writ of error.

MR. JUSTICE BRADLEY, after stating the case, delivered the opinion of the court.

The material question in this case is, whether, in view of the express provisions of the policy, the evidence introduced by the assured was relevant and competent to show that the company had authorized its agent to grant indulgence as to the time of paying the premium notes, and waive the forfeiture incurred by their non-payment at maturity ; or to show that any valid extension had, in fact, been granted, or the forfeiture of the policy waived.

The written agreement of the parties, as embodied in the policy and the indorsement thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts or waive forfeitures. And these terms, had the company so chosen, it could have insisted on. But a party always has the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures; but might, at any time, at its option, give them such power. The declaration was only tantamount to a notice to the assured, which the company could waive and disregard at pleasure. In either case, both with regard to the forfeiture and to the powers of its agent, a waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing.

That it did authorize its agents to take notes, instead of money, for premiums, is perfectly evident, from its constant practice of receiving such notes when taken by them. That it

authorized them to grant indulgence on these notes, if the evidence is to be believed, is also apparent from like practice. It acquiesced in and ratified their acts in this behalf. For a long period it allowed them to give an indulgence of ninety days; after that, of sixty; then of thirty days. It is in vain to contend that it gave them no authority to do this, when it constantly allowed them to exercise such authority, and always ratified their acts, notwithstanding the language of the written instruments.

We think, therefore, that there was no error committed by the court below in admitting evidence as to the practice of the company in allowing its agents to extend the time for payment of premiums, and of notes given for premiums, as indicative of the power given to those agents; nor any error in submitting it to the jury, upon such evidence, to find whether the defendant had or had not authorized its agent to make such extensions, nor in submitting it to them to say whether, if such authority had been given, an extension was made in this case.

Much stress, however, is laid on the fact that the extension claimed to have been given in this case was not given, or applied for, until after the first note became due and the forfeiture had been actually incurred. But we do not deem this to be material. The evidence does not show that any distinction was made in granting extensions before or after the maturity of the notes. The material question is, whether the forfeiture was waived; and we see no reason why this may not be done as well by an agreement made for extending the note after its maturity, as by one made before. In either case, the legal effect of the indulgence is this: the company say to the insured, Pay your note by such a time, and your policy shall not be forfeited. If the insured agrees to do this, and does it, or tenders himself ready to do it, the forfeiture ought not to be exacted. In both cases, the parties mutually act upon the hypothesis of the continued existence of the policy. It is true, if the agreement be made before the note matures and before the forfeiture is incurred, it would be a fraud upon the assured to attempt to enforce the forfeiture, when, relying on the agreement, he permits the original day of payment to pass. On the other hand, if the agreement be made after the note matures, such agreement is itself a recognition, on the company's part, of the con-

tinued existence of the policy, and, consequently, of its election to waive the forfeiture. It is conceded that the acceptance of payment has this effect; and we do not see why an agreement to accept, and a tender of payment according to the agreement, should not have the same effect. Both are acts equally demonstrative of the election of the company to waive the forfeiture of the policy. Grant that the promise to extend the note is without consideration, and not binding on the company—which is perhaps true as well when the promise is made before maturity as when it is made afterwards—still it does not take from the company's act the legitimate effects of such act upon the forfeiture of the policy. Perhaps the note might be sued on in disregard of the extension; but if it could be, that would not annihilate the fact that the company elected to waive the forfeiture by entering into the transaction. If it should repudiate its agreement, it could not repudiate the waiver of the forfeiture, without at least giving to the assured reasonable notice to pay the money.

Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made. It is true, we held in *Statham's Case*, 93 U. S. 24, that, in life insurance, time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given, the courts should be liberal in construing the transaction in favor of avoiding a forfeiture.

The case of leases is not without analogy to the present. It is familiar law, that, when a lease has become forfeited, any act of the landlord indicating a recognition of its continuance, such as distraining for rent, or accepting rent which accrued after the forfeiture, is deemed a waiver of the condition.

In *Doe v. Meux*, 4 Barn. & Cress. 606, there was a general covenant to repair, and a special covenant to make specific repairs after three months' notice; and a condition of forfeiture for non-performance of covenants. The landlord gave notice to the tenant to make certain specific repairs within three months. This was held a waiver of the forfeiture already incurred under the general covenant. Justice Bailey said:

"The landlord, in this case, had an option to proceed on either covenant; and, after giving notice to repair within three months, he might have brought an action against the defendant upon the former covenant, for not keeping the premises in repair. But that is very different from insisting upon the forfeiture. . . . I think that the notice amounted to a declaration that he would be satisfied if the premises were repaired within three months, and that he thereby precluded himself from bringing an ejectment before the expiration of that period."

IN *Doe v. Birch*, 1 Mee. & W. 402, there was a covenant on the part of the tenant to make certain improvements on the premises within three months, or that the lease should be void. He failed to make the improvements in the manner stipulated; and, after the expiration of the three months, the landlord's son, on his father's behalf, made a demand of a quarter's rent. But, it not appearing that the landlord knew of the tenant's failure with regard to the improvements, it was held that the son had not sufficient authority to waive the forfeiture. Otherwise, it seems, that the demand of the rent would have amounted to a waiver. Baron Parke referred to *Green's Case*, 1 Croke, 3, where calling the party a tenant, in a receipt for bygone rent, was held to be sufficient evidence of a waiver, though the acceptance of that rent was not such. And he adds: "If it had been proved that the father had notice of the alterations, and he had still allowed the son to receive the rent, the forfeiture might have been waived. But that was not proved; and the question of waiver does not, therefore, distinctly arise in the case. If it had, the authorities cited show that this was a lease voidable at the election of the landlord. Then, I think that an absolute, unqualified demand of rent, by a person having sufficient authority, would have amounted to a waiver of the forfeiture, and it would have been like the case I cited from Croke's Reports."

In *Ward v. Day*, 4 Best & Smith, 335, after a forfeiture of a license to gather minerals off of a manor had been incurred, the landlord entered into negotiations with the licensee and his son, to grant to the latter a renewal of the license when it should expire; and terms were agreed on, which the landlord afterwards refused to carry out. It was held, that, by entering into these negotiations, he waived the forfeiture of the

original license. The negotiations assumed that the original license was to continue to its termination. The exaction of the forfeiture was in the landlord's election; and he evinced his election not to enforce it by entering into the negotiations. Justice Blackburn says: "Most of the cases in which the doctrine of election has been discussed have been cases of landlord and tenant under a regular lease, in which has been reserved a right of re-entry for a forfeiture—that is, an option to determine the lease for a forfeiture; but this doctrine is not, as Mr. Russell seems to think, confined to such cases. So far from that being so, the doctrine is but a branch of the general law, that, where a man has an election or option to enter into an estate vested in another, or to deprive another of some existing right, before he acts he must elect, once for all, whether he will do the act or not. He is allowed time to make up his mind; but when once he has determined that he will not consider the estate or lease—whichever it may be—void, he has not any further option to change his mind." And then the learned judge cites authorities, going back to the Year Books, to show that a determination of a man's election in such cases may be made by express words or by act; and that if, by word or by act, he determines that the lease shall continue in existence, and communicates that determination to the other party, he has elected that the other shall go on as tenant.

These cases show the readiness with which courts seize hold of any circumstances that indicate an election or intent to waive a forfeiture. We think that the present case is within the reason of these authorities; and that the objection, that the note was already past due when the agreement to extend it was made, is not sufficient to prevent said agreement from operating as a waiver of the forfeiture.

We find no error in the record, and the judgment of the Circuit Court is

Affirmed.

MR. JUSTICE SWAYNE, MR. JUSTICE FIELD, and MR. JUSTICE STRONG dissented.

MR. JUSTICE STRONG. I dissent from the judgment given in this case. The insurance effected by the policy became for-

feited by the non-payment *ad diem* of the premium note. The policy then ceased to be a binding contract. It was so expressly stipulated in the instrument. Admitting that the company could afterwards elect to treat the policy as still in force, or, in other words, could waive the forfeiture, the local agent could not, unless he was so authorized by his principals. The policy declared that agents should not have authority to make such waivers. And there is no evidence in this case that the company gave to the agent parol authority to waive a forfeiture after it had occurred. They had ratified his acts extending the time of payment of premium notes, when the extension was made before the notes fell due. But no practice of the company sanctioned any act of its agent done after a policy had expired, by which new life was given to a dead contract.

CONNECTICUT SUPREME COURT OF ERRORS, 1874.

RYAN v. WORLD MUTUAL LIFE INS. CO.

(41 Conn. 168.)

It is prima facie negligence for the applicant to omit to read the application which he signs, and this presumption is conclusive, unless overcome by proper evidence.

CARPENTER, J.—This is an action on a policy of life insurance. The policy is expressed to be “in consideration of the representations, declarations and covenants contained in the application therefor, to which reference is here made as a part of this contract, etc.” It is further declared that “This policy is issued and accepted on the following express conditions and agreements: First. That the statements and declarations made in the application therefor, and on the faith of which it is issued, are in all respects true, etc.” The application, therefore, is a part of the policy; and the plaintiff’s agreements therein contained are warranties, and, if not true, she cannot recover, unless there has been a waiver by the defendants, or under the circumstances they are estopped from denying their truth.

In the application are the following questions and answers:

“12. Has the party ever had any of the following diseases [naming a long list of diseases, and among them]: bronchi-

tis, consumption, spitting of blood, or any serious disease?"—"None of these."

"17. Has the party had during the last seven years any severe sickness or disease? If so, state the particulars, and the name of the attending physician who was consulted and prescribed."—"No."

"25. Has the party employed or consulted any physician? Please answer this yes or no. If yes, give name or names and residence."—"No."

"27. Has any previous examination or application been made for assurance on the life proposed?"—"No."

"Has any company declined to issue a policy for the party?"—"No."

Upon the trial the plaintiff offered to prove, not that the above answers were true, but that different answers were in fact given, both by herself and the insured, and that the answers were wrongly written by the local agent of the defendants without the knowledge or consent of the plaintiff or her husband. Aside from the claim that the defendants are responsible for the conduct of their local agent, this is merely an attempt to substitute for a part of the written contract declared on, a different parol contract; for the representations and warranties of the plaintiff contained in the written agreement, oral representations and warranties of an entirely different character. It requires no argument to show that this cannot be done.

But the plaintiff claims that truthful answers having been given to each interrogatory, and the incorrect answers contained in the application being there by the sole act of the agent, the defendants are bound by the answers as written, and are precluded from denying their truth. Whether this is so or not depends upon the extent of the agent's authority.

It must be admitted that the express authority of the agent was limited to receiving the application, forwarding it to the home office, receiving, countersigning, and delivering the policy and collecting the premiums. The courts in this State have construed the powers of these agents liberally, and extended them somewhat by implication. Thus it has been held that in writing the application, and explaining the interrogatories and the meaning of the terms used, he is to be regarded as the agent of the company.

In this case we are asked to go further than any case has yet gone, and clothe the agent with an authority not given him in fact, and to hold the principal responsible for an act which could not by any possibility have been contemplated as being within the scope of the agency. In most, if not in all, of the cases in which the act of the agent has been regarded as the act of the principal, the act has been the natural and probable result of the relations existing between the parties, or so connected with other acts expressly authorized as to afford a reasonable presumption that the principal intended to authorize it. But it cannot be supposed that these defendants intended to clothe this agent with authority to perpetrate a fraud upon themselves. That he deliberately intended to defraud them is manifest. He well knew that if correct answers were given no policy would issue. Prompted by some motive he sought to obtain a policy by means of false answers. His duty required him not only to write the answers truly as given by the applicant, but also to communicate to his principal any other fact material to the risk which might come to his knowledge from any other source. His conduct, in this case, was a gross violation of duty, in fraud of his principal, and in the interest of the other party. To hold the principal responsible for his acts, and assist in the consummation of the fraud, would be monstrous injustice. When an agent is apparently acting for his principal, but is really acting for himself, or third persons, and against his principal, there is no agency in respect to that transaction, at least as between the agent himself or the person for whom he is really acting and the principal.

The principal reason urged for holding the defendants liable in this case is the one suggested in the argument, that when one of two innocent persons must suffer by the fraud, negligence, or unauthorized act of a third, he who clothed the third with the power to deceive or injure must be the one.

Our answer is, in the first place, that this is not exactly a case in which one of two innocent persons must necessarily suffer. There is no absolute loss for us to determine on whom it shall fall. If the plaintiff fails to recover she sustains no pecuniary loss, except the premium paid, nor that even if she is innocent and the law is so that she can recover it back on

the ground that there was a failure of consideration. It is unlike a case of fire insurance. Nearly all property may be insured at some rate, if not in one office in another. But in this case the plaintiff's husband was not an insurable subject. His situation was such that one company had rejected him, and but for the aid of fraud neither this nor any other company would have accepted him. Had the truth been stated no policy would have issued, and as she would have had no better success probably with other companies we cannot see that she has been misled to her prejudice except in relation to the premium, which is comparatively a small matter.

In the second place, if the rule is to be applied to this case it is by no means certain that it will aid the plaintiff. The fraud could not be perpetrated by the agent alone. The aid of the plaintiff or the insured, either as an accomplice or as an instrument, was essential. If she was an accomplice, then she participated in the fraud, and the case falls within the principle of *Lewis v. The Phoenix Mutual Life Ins. Co.*, 39 Conn. 100. If she was an instrument, she was so because of her own negligence, and that is equally a bar to her right to recover. She says that she and her husband signed the application without reading it and without its being read to them. That of itself was inexcusable negligence. The application contained her agreements and representations in an important contract. When she signed it she was bound to know what she signed. The law requires that the insured shall not only, in good faith, answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written. It is for his interest to do so, and the insurer has a right to presume that he will do it. He has it in his power to prevent this species of fraud and the insurer has not.

Courts should never extend by implication the power of an agent except to carry into effect the probable intention of the parties, or to prevent third persons dealing with the agent from being misled to their injury. In this case there is no ground for the supposition that the defendants ever intended to authorize the agent to act directly contrary to their interests; and if the plaintiff has been deceived, her own negligence at least materially contributed to it.

We need not enlarge upon the evils necessarily resulting

from holding insurance companies liable for such acts of their agents. The question is vital to the insurance interests of the country. The insured no less than the insurers are deeply interested in it. If this verdict is sustained it will tend to establish a principle fraught only with mischief. Every life insurance company in this country, and to some extent the fire insurance companies, will be at the mercy of their agents. A door will be open to fraud, collusion, and legal robbery, unprecedented in the history of jurisprudence. In view of the probable consequences of such a principle—evils co-extensive almost with the magnitude of the interests involved—we ought to pause and consider well before extending the doctrine of some of the modern cases to a case like this.

We are constrained therefore to hold that a limited agency in a case of life insurance will not be extended by operation of law to an act done by the agent in fraud of his principal, and for the benefit of the insured, especially where it is in the power of the insured by the use of reasonable diligence to defeat the fraudulent intent.

The court very properly instructed the jury that "an untrue or fraudulent statement or denial made by the applicant of a fact material to the risk to induce the issuance of a policy will prevent the policy from taking effect as a valid contract, unless the insurer has in some way waived or estopped himself from relying upon such misstatement to avoid the policy. This waiver, to be effectual, must be made by an officer of the company authorized to make it. If there has been no evidence of any waiver except by a medical examiner of the company, or by a local agent, there must be additional proof of specific authority given them, or the company will not be bound."

Some of the cases cited by the plaintiff are cases of fire insurance, in which the agents were intrusted with blank policies, signed by the president and secretary, and had full power to fill up and issue the same without referring the application to the home office. In such cases the corporation contracts solely by its agent. The acts and knowledge of the agent are the acts and knowledge of the corporation, and there is a manifest propriety in holding the corporation liable accordingly.

This court has held that in writing the answers to the

interrogatories in the application, the agent is to be regarded as the agent of the company rather than the agent of the insured. We do not question the propriety of those decisions, considering the circumstances of the cases in which they were made; but we cannot regard them as establishing an inflexible rule of law applicable to all cases.

A brief reference to some of the cases will illustrate the distinction which we make. When the applicant stated fully and truthfully the circumstances relating to the title to the property insured, and the agent, knowing all the facts, but for the sake of convenience, stated the title incorrectly and issued a policy, it was held that the company could not take advantage of it. The court regarded the transaction as equivalent to an agreement that, for the purpose of the insurance, the title should be considered as it was stated to be by the agent. *Peck v. New London County Mutual Ins. Co.*, 22 Conn. 575. See also *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517.

When the applicant answered the interrogatory, "Is a watch kept on the premises during the night?" by stating the facts, and the agent wrote the answer, "Watchman till 12 o'clock," which answer was not strictly true, it was held that the company was bound by it. *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465. See also *Beebe v. Hartford County Mut. Fire Ins. Co.*, 25 Conn. 51; *Hough v. City Fire Ins. Co.*, 29 Conn. 10.

The case before us is a case of life insurance. The power of the agent was in fact limited. He had no power to issue policies. The terms of his agency conferred no authority to waive conditions or forfeitures, or to agree to false and fraudulent answers to any of the interrogatories, or to make any other contract to bind the company. Presumptively the insured and the plaintiff knew all this before paying the premium; for the printed policy, which was in their hands for several days, contained at the bottom this note: "The president and secretary of the company are alone authorized to make, alter or discharge contracts, or to waive forfeitures." The jury then were correctly told that "there must be additional proof of special authority given them," (the local agent and the medical examiner,) "or the company will not be bound."

The jury found such special authority. But we look through the record in vain to find any evidence to support such a finding.

The verdict was manifestly against the evidence, and justice requires that it should be set aside and a new trial awarded.

CHAPTER IX.

GENERAL PRINCIPLES: MARINE.

COURT OF EXCHEQUER, 1839.

DIXON v. SADLER.

(5 M. & W. 405.)

Warranty of seaworthiness.

ASSUMPSIT on a policy of insurance, dated the 22d of January, 1838, on the ship *John Cook*, and cargo, at and from the 17th of January, 1838, until the 17th of July, 1838, at noon, in port and at sea, at all times and in all places, being for the space of six calendar months.

The declaration averred the loss of the ship to have taken place on the 19th of May, 1838, by perils of the sea. The defendant pleaded, first, that the vessel was not lost by the perils of the sea; secondly, the following special plea: "That, though true it is that the said vessel was by the perils of the sea wrecked, broken, damaged, and injured, and became and was wholly lost to the plaintiffs, for plea, nevertheless, the defendant says that the said wrecking, breaking, damaging, and injuring the said vessel, and the loss of the same by the perils of the sea, as in the said first count mentioned, was occasioned wholly by the willful, wrongful, negligent, and improper conduct (the same not being barratrous) of the master and mariners of the said ship, whilst the said ship was at sea, as in the said first count mentioned, and before the same was wrecked, broken, damaged, injured, or lost, as therein mentioned, to wit: on the 19th of May, 1838, by willfully, wrongfully, negligently, and improperly (but not barratrously) throwing overboard so much of the ballast of the said ship, that by means thereof she then became and was top-heavy, crank, unfit to

carry sail, and wholly unseaworthy, and unfit and unable to endure and encounter the perils of the sea which she might and would otherwise have been able to have safely encountered and endured; and by means and in consequence of the said willful, wrongful, negligent, and improper (but not barratrous) conduct of the said master and mariners, the said ship became and was wrecked, broken, damaged, injured, and lost by the perils of the sea, which perils, but for the said conduct of the said master and mariners, she could and would have safely encountered and overcome without being so wrecked, broken, damaged, injured, and lost, as in the said first count is mentioned."

The plaintiff replied, "That the said wrecking, breaking, damaging, injuring the said vessel, or the loss of the same by the perils of the sea, as in the first count mentioned, was not so occasioned by such conduct of the master or mariners of the said ship, in manner and form as in the said plea is alleged," etc.

At the trial before Parke, B., at the last Spring Assizes for Northumberland, it appeared that the plaintiff was a ship-owner residing at Sunderland, and was the owner of the *John Cook*, and had effected the policy in question with the defendant, an underwriter at Lloyd's. The vessel left Rotterdam for Sunderland properly ballasted and equipped on the 15th of May, and arrived on the 19th of May opposite a point called Seaham, which was about four miles from the port of Sunderland. On arriving there, and having a pilot on board, the master commenced heaving part of the ballast overboard, as was proved to be usual on such occasions. Whilst this was going on the vessel drifted to the northward, and a strong squall coming on, the vessel drifted to the southeast, the ship was upset on her broadside, and her masts lay on the water. Every endeavor was made to right her, but in vain. She afterwards sank, off Ryhope, drifted on shore, and became a total wreck. If the crew had not removed the ballast, the ship would most likely have stood the squall. It was objected at the trial that this was not a risk which the underwriter had undertaken to indemnify against. The learned judge was of opinion that the word "willful" in the plea meant that the ballast was knowingly thrown overboard, and in a negligent manner, but said he would reserve that question for the opinion

of the court. And his Lordship left two questions to the jury: First, was it negligent conduct to throw the ballast overboard before arriving in harbor? Secondly, did they think the master exercised a reasonable discretion in throwing overboard? They found, as to the first question, that they did think it negligent generally to throw over the ballast; secondly, that the master did right, supposing the practice itself authorized him. A verdict was thereupon entered for the defendant on the second issue, the learned judge giving the plaintiff liberty to move to enter a verdict on that issue, if the Court should be of opinion that his construction of the meaning of the word "wilful," as used in the plea, was incorrect.

PARKE, B.—In this case the defendant, to a declaration upon a time policy for six months, stating a loss by perils of the seas, pleaded three pleas, on each of which issue was joined. On the first and third, the verdict was found for the plaintiff; on the second, for the defendant. This plea stated, "that, though the vessel was lost by perils of the sea, yet that such loss was occasioned wholly by the willful, wrongful, negligent, and improper conduct of the master and mariners of the ship, by willfully, wrongfully, negligently, and improperly throwing overboard so much of the ballast that the vessel became unseaworthy, and was lost by the perils of the sea, which otherwise she would have safely encountered and overcome." On a motion for a judgment *non obstante veredicto*, it occurred to the court to be questionable whether the plea was not at all events bad, inasmuch as the terms of it did not exclude the case of a loss by barratry, for which the underwriters would be clearly liable, and that on this declaration, and, as the fact certainly was, that the crew were not guilty of barratry, it was very properly agreed that the plea should be amended by inserting the words "but not barratrously" after the words "negligently and improperly." And the plea, therefore, in its present shape raises the question whether the underwriters are liable for the willful but not barratrous act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by casting overboard a part of the ballast. The case was very fully and ably argued, during the course of the last and present term, before my brothers, Alderson, Gurney,

Maule, and myself. We have considered it, and are of opinion that the plea is bad in substance, and that the plaintiff is entitled to judgment, notwithstanding the verdict.

The question depends altogether upon the nature of the implied warranty as to seaworthiness or mode of navigation between the assured and the underwriter on a time policy. In the case of an insurance for a *certain voyage*, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk. And, if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it (as, if it were a voyage down a canal or river and thence across to the open sea), it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall *continue* seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against. This principle is now clearly established by the cases of *Busk v. Royal Exchange Company*, 2 B. & Ald. 72; *Walker v. Maitland*, 5 B. & Ald. 171; *Holdsworth v. Wise*, 7 B. & C. 791; *Bishop v. Portland*, id. 219; and *Shore v. Bentall*, id. 798, *n.*; nor can any distinction be made between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether fire which causes a loss be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which renders the ship unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of shipping it, or cutting it away; nor could it make any difference whether any other part of the equipment were lost by mere neglect, or thrown away or destroyed in the exercise of an improper discretion, by those on board. If there be any fault in the crew, whether of

omission or commission, the assured is not to be responsible for its consequences.

The only case which appears to be at variance with this principle is that of *Law v. Hollingsworth*, 7 T. R. 160, in which the fact of the pilot, who had been taken on board for the navigation of the River Thames, having quitted the vessel before he ought (under what circumstances is not distinctly stated) appears to have been held to vitiate the insurance. In this respect, we cannot help thinking that the case, although attempts were made to distinguish it in some of the decided cases, must be considered as having been overruled by the modern authorities above referred to; and that the absence, from any cause to which the owner was not privy, of the master or any part of the crew, or of the pilot (who may be considered as a temporary master), after they had been on board, must be on the same footing as the absence, from a similar cause, of any part of the necessary stores or equipments originally put on board. The great principle established by the more recent decisions is, that, *if the vessel, crew, and equipments be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew*; and this principle prevents many more and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of insurance.

If the case, then, were that of a policy for a particular voyage, there would be no question as to the insufficiency of the plea; and the only remaining point is, whether the circumstance of this being a *time policy* makes a difference. There are not any cases in which the obligation of the assured in such a case, as to the seaworthiness or navigation of a vessel, is settled; but it may be safely laid down, that it is not more extensive than in the case of an ordinary policy, and that, if there is no contract as to the conduct of the crew in the one case, there is none in the other. Here it is clear that no objection arises on the ground of seaworthiness of the vessel until that unseaworthiness was caused by throwing overboard a part of the ballast, by the improper act of the master and crew; and, as the assured is not responsible for such improper act, we

are of opinion that the plea is bad in substance, and the plaintiff entitled to our judgment.

*Rule absolute to enter judgment for the plaintiff,
non obstante veredicto.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1878.

BURGESS .v. EQUITABLE MARINE INS. CO.

(126 Mass. 70.)

Warranty against deviation.

Action of contract on a policy of insurance.

Risk to commence June 13, 1874, and to expire with the voyage. The vessel insured, named *Christie Johnstone*, sailed from Plymouth on June 13, 1874, on a cod-fishing voyage to the Banks, in a seaworthy condition, with four barrels of clam bait, which was the usual quantity of bait taken by vessels of her class on such a voyage. For several years past it had been the practice of such vessels to take a supply of bait insufficient to last for the entire trip, and to rely principally on catching squid on the Banks, to use for bait; and for years prior to 1874 squid had been plenty on the Banks, but in 1874 they were very scarce.

After fishing on the Banks for three weeks, and having exhausted nearly all his bait, the master of the vessel, solely for the purpose of procuring bait, went to St. Peter's, the nearest practicable port where bait could be obtained, there procured bait, and then sailed from St. Peter's to the Banks, and resumed fishing. To reach the port of St. Peter's, the vessel sailed about one hundred and ten miles from the fishing-ground. She left the fishing-ground on Thursday, reached St. Peter's on Saturday, and, having procured bait there, left St. Peter's on Tuesday following, and then sailed for another bank, where she arrived and resumed her fishing on the next Thursday. On August 6, 1874, while so fishing on the Banks, the vessel encountered a severe gale, sprung a leak, and was totally lost, with all the property on board.

The defendant requested a ruling from the trial judge, that these facts amounted in law to a deviation; which was declined, the judge ruling as follows: "If the vessel left Plym-

outh with the usual amount of bait for the kind of fishing in which she was to engage, and by an unexpected failure of bait of the kind ordinarily taking on the fishing-ground, it became necessary for her to go into port to procure bait, and she went to the nearest practicable port for that purpose, such going into port was not, as matter of law, a deviation."

ENDICOTT, J.—By the terms of the policy the vessel was insured "at and from Plymouth to the Banks, cod-fishing, and at and thence back to Plymouth." This is a definite and distinct description of the contemplated voyage between two fixed termini. The Banks are named as the outward terminus, and while there engaged in cod-fishing, and until her return to Plymouth, the vessel was covered by the policy. The language used is not open to the construction that it was the intention of the parties to insure her while prosecuting the adventure elsewhere, or doing what was necessary to make it successful outside and beyond the prescribed limits. A voyage is the sailing of a vessel from one port or place to another port or place, and the purpose for which it is to be conducted, whether as a trading, freighting, or fishing voyage, is often mentioned in policies of insurance. But this designation cannot vary or extend the description, route, or termini of the voyage as named in the policy, unless some usage, connected with the particular trade or adventure, is shown to exist. No evidence was offered of a usage in such voyages to leave the Banks and go into port for bait. So far as the evidence reported discloses any usage in that regard, it appears that for some years it had been the practice to carry out a limited amount of bait, and to rely upon obtaining an additional supply on the Banks. Such being the practice to obtain bait on the Banks, when the supply taken out was exhausted, a departure from the Banks for that purpose could not have been contemplated by the parties in making the policy. We have, therefore, a definite description of the voyage in the policy, and a usage that does not extend its provisions. The question decided in *Friend v. Gloucester Ins. Co.*, 113 Mass. 326, arose upon a clause in a policy prohibiting a fishing vessel from sailing on a voyage east of Cape Sable after a certain date, and throws no light upon the construction to be given to the words of this policy.

The decision in *The Tarquin*, 2 Lowell, 358, turned upon the construction of the shipping articles of seamen, and not of a policy of insurance.

We are, therefore, of opinion, that the vessel, by leaving the Banks and going to St. Peter's for bait, departed from the voyage described in the policy; and the only question to be determined is, whether in law there has been a deviation which avoids the policy.

It may be stated, in general terms, that the assured is protected by his policy while the vessel pursues the usual and customary course of the voyage; but any departure from the course, or delay in prosecuting it, without necessity or just cause, is a deviation, and discharges the insurer, because another voyage has been voluntarily substituted for that which was insured. Whether the degree or period of the risk is increased, is unimportant, as the assured has no right to substitute a different risk. Whenever, therefore, there is a manifest departure from the course of the voyage, the assured must show that it was justified by the necessity of the case. *Stocker v. Harris*, 3 Mass. 409, 418; *Brazier v. Clap*, 5 Mass. 1; *Coffin v. Newburyport Ins. Co.*, 9 Mass. 436, 449; *Kettell v. Wiggin*, 13 Mass. 68.

In the case at bar, the alleged necessity arose from scarcity of bait. The plaintiff did not put on board, when the vessel sailed from Plymouth, enough for the entire trip. Squid had been plenty on the Banks during several years prior to 1874, and the plaintiff relied upon catching them and using them for that purpose. They happened this season to be very scarce, and, after fishing three weeks and nearly exhausting his supply, the master sailed for St. Peter's, over one hundred miles distant, procured bait, and returned to the Banks after an absence of a week. It is to be observed that this so-called necessity did not arise from any peril insured against in the policy, or ordinarily insured against in policies of insurance, and did not involve the safety of the vessel or of any property on board: it had relation solely to the success of the fishing adventure, and in this the defendant had no interest and had assumed no responsibility.

We are of opinion that the claim of the plaintiff cannot be sustained; and that a necessity to justify the departure in this

case cannot be found in the fact that, without going to St. Peter's for bait, the voyage would have failed to be successful or profitable to the plaintiff.

The strictness with which the courts have held the insured to the route named in the policy is illustrated by the cases already cited, and by many others cited at the argument. *Dodge v. Essex Ins. Co.*, 12 Gray, 65; *Middlewood v. Blakes*, 7 T. R. 162; *Brown v. Tayleur*, 4 A. & E. 241; *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 571; *Merchants' Ins. Co. v. Algeo*, 32 Penn. St. 330. But the question to be determined here is, what is the nature and extent of the necessity or just cause which will warrant a departure from the route.

In this connection it may be well to refer to the necessities which clearly justify a departure. There is no deviation where the master is compelled by force either to depart from his route or delay its prosecution by the acts of his crew; *Elton v. Brogden*, 2 Str. 1264; *Driscoll v. Passmore*, 1 B. & P. 200; *Driscoll v. Bovil*, 1 B. & P. 313; or where he is detained by those in authority, or taken out of his course by a ship of war; *Scott v. Thompson*, 1 N. R. 181. In *Phelps v. Auldjo*, 2 Camp. 350, a master was ordered to sail out and examine a vessel in the offing by a captain of a king's ship, and, it appearing that he complied without remonstrance or threat of force, it was held to be a deviation. In cases of this description there must be a *vis major*, compelling a departure or delay, which excuses the master. So, where the master is obliged to leave his course, or delay by stress of weather or other peril of the sea, or to go into port to repair or refit, or to re-man or recruit his crew disabled by sickness or reduced by casualties, or to avoid capture, or to join convoy in time of war, there is no deviation. It is unnecessary to cite all the cases which fall within these exceptions; many of those relied on by the plaintiff are clearly within them. *Dunlop v. Allan*, Millar on Ins., 414; *Green v. Elmslie*, Peake, 212; *Clark v. United Ins. Co.*, 7 Mass. 365. The case last cited is put upon the express ground that the ship was prevented by causes insured against from proceeding on her route, and the departure was from necessity. See also *Folsom v. Merchants' Ins. Co.*, 38 Maine, 414.

Nor is the departure from the route for the purpose of saving human life a deviation; nor is a policy avoided when the

ship goes out of her course to obtain necessary medical assistance for those lawfully on board. *Bond v. Brig Cora*, 2 Wash. C. C. 80; *Perkins v. Augusta Ins. Co.*, 10 Gray, 312. In this class of cases the justification does not rest on the same ground as in those previously noticed. It is allowed from motives of humanity, and cannot be extended to the saving or protection of property. In all cases the necessity must be a real and imperative necessity affecting the vessel—such as actual force preventing the master from exercising his will, peril of the sea, danger of capture, want of repair, disability of the crew, or unseaworthiness—occurring under such circumstances that the master, acting upon his best judgment for the interest of all parties, has no alternative, and is forced to leave his route or delay its prosecution.

When the departure is caused by such a necessity the change of route in no respect alters the insurance, because the course of a sea-voyage must at times be necessarily subject to extraordinary perils of the sea, and contingencies beyond the control of the master, and in the presence of which he is forced to succumb; and when they occur, and he is obliged to depart from the usual course of the voyage, there is no deviation in the legal sense of the term, for the departure is the necessary incident of the route named in the policy as prosecuted at the time by the ship. The probability of such occurrences is well understood; they are known perils of the voyage, and enter into the ordinary contract of marine insurance. And when the master, compelled by the necessity, does that which is for the benefit of all concerned, the act is within the intention of the policy as much as if expressed in terms. It would be practically impossible to state in the policy all the perils which might arise in a sea-voyage and excuse departure from the route; and, therefore, by the rules of interpretation applicable to this species of contract, the policy is held by implication to include them. See *Green v. Pacific Ins. Co.*, 9 Allen, 217, 219. In such a policy as this the necessities justifying a departure, in the absence of usage, from the route, and a visit to a port not named, are those which are caused by some peril occurring in the prosecution of the voyage within the limits named in the policy, and not those which arise in the prosecution of the business for which the voyage was undertaken.

It is true, there is a class of cases, much relied on by the plaintiff, where the test is whether the ship at the time of the alleged deviation was pursuing the object and business of the voyage. But those are cases of delay, where the ship was at the port or place named or permitted in the policy. The permission in a policy to go to certain ports or places must always be construed in reference to the purpose of the voyage. *Williams v. Shee*, 3 Camp. 469; 1 Arnould on Ins., §§ 141, 142. Any delay for the prosecution of other business, or any unreasonable delay in prosecuting the business of the voyage, at such port, is a deviation. *African Merchants v. British Ins. Co.*, L. R., 8 Ex. 154. But if the delay was necessary in order to accomplish the objects of the voyage, and was reasonable under the circumstances of the case, then there is no deviation. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383; *Phillips v. Irving*, 7 Man. & Gr. 325. In other words, if the ship is at a place permitted, the delay shall not be a deviation, if it is necessary in the proper prosecution of the business of the voyage. But this test cannot be applied to a departure from the route to a port not named or permitted, for the purpose of the adventure. In all trading voyages, for example, the ship is confined to the ports or coasts named in the policy, and she cannot depart to other places simply because she may better prosecute the trade elsewhere. If the departure from the route to insure the success of the adventure can be justified as a necessity, it would be difficult to state any limit to the privilege, or to the duration of the insurance, and, in the absence of permission to do so in the policy, it cannot be implied. See *Kettell v. Wiggin*, 13 Mass. 68; *Robertson v. Columbian Ins. Co.*, 8 Johns. 491. The plaintiff's vessel might have delayed for any reasonable time upon the Banks for the purpose of fishing or getting bait, without being guilty of deviation; and would have been protected by the policy, even without proof of usage, because fishing was the purpose of the voyage, and she could properly prosecute it within the route named in the policy. *Noble v. Kennoway*, 2 Doug. 510, 513. But she could not go beyond or away from the route for that purpose.

The illustration put by the defendant's counsel is apposite: "If a vessel insured to Havana and back should learn, before entering the port, that there was no cargo there with which

she could be loaded, no one would say that her policy protected her in going to the nearest port where a cargo could be had." Other illustrations may be given. If a vessel insured to a particular port, having letters of credit, should find on arrival that the parties on whom they were drawn had failed, she could not go to another port for funds, and return for her cargo, and be protected by her policy. If fish had been scarce on the Banks in 1874, it would hardly be contended that the vessel could have gone to other fishing-grounds to fish, although not more distant than St. Peter's; and yet, if she was justified by necessity in leaving to obtain bait at St. Peter's and to return in order to make the trip successful, it would be difficult to hold that the same necessity would not allow her to fish elsewhere.

In the argument of the plaintiff's counsel, no case was cited which sustains the position he has assumed, and we are not aware of any case which goes to this extent. In *Greene v. Pacific Ins. Co.*, 9 Allen, 217, the voyage was broken up by reason of perils to the ship insured against in the policy, and the question was as to the right to abandon. In *Stocker v. Harris*, 3 Mass. 409, which is strongly relied on by the plaintiff, an American ship sailing under Spanish colors, as allowed by the policy, delayed at Vera Cruz five months for the purpose of recovering outward cargo which had been seized after landing by the authorities. The captain failed to obtain a restitution, and being unable to obtain a clearance from Vera Cruz to the United States under Spanish colors without giving bond to land his cargo in some part of the dominion of Spain, and there being a partner of a Spanish house in Havana by whose assistance he could restore the character of his ship as an American bottom, he took a cargo and freight and sailed for Havana. It is stated in the opinion, though not necessary to the decision, that the delay at Vera Cruz was not a deviation. And it was said by the court: "It may be understood that the insurers by this policy" (which was on ship, cargo, and freight) "were not interested in the outward cargo, after it had been safely landed from the ship. But the captain is the common agent of the concerned, and it is his duty to manage their distinct and separate, as well as their joint interests, according to his best judgment; and whatever is fairly done with

this purpose is within the course of the voyage." This is simply stating, in another form of words, that the object for which the ship was at Vera Cruz was the disposal of her cargo, and if the delay was occasioned by fairly attempting to do so, there was no deviation. But the case was decided for the defendant, on the ground that, in sailing for Havana, instead of to a port in the United States as required by the policy, the ship deviated, and that the reason for doing so was not such a necessity as justified the departure. It was suggested, in giving the reasons for this decision, that if the partner had died or had left Havana before the ship arrived, then, by force of the same necessity, a voyage to some other Spanish port or ports would have been equally excused; and thus the ship might have made several passages, although by the terms of the policy she was only insured from Vera Cruz to the United States; and that this would have been to engage the insurer in an unlimited voyage and risk. The same suggestion would be applicable in this case. If the master had failed to find bait at St. Peter's, the same necessity would have justified him in visiting port after port until he found it.

As in the opinion of the court the trip to St. Peter's was a deviation which discharged the insurer, by the terms of the report there must be

Judgment for the defendant.

CHAPTER X.

GENERAL AVERAGE.

UNITED STATES SUPREME COURT, 1869.

STAR OF HOPE.

(9 Wall. 208.)

General average : sacrifices, expenses, stranding.

LIBELS by the shippers of cargo against the ship for non-performance of contract of affreightment by reason of failure to deliver cargo, which had been sold by the master in the course of the voyage to pay for repairs at Montevideo, made necessary by the stranding of the ship. Answer by ship-owners, that the stranding took place under circumstances which made the damage, and all expenses consequent thereon, a subject of general average contribution.

The district and circuit courts decreed in favor of the libellants, and decided that the loss and expense consequent upon the stranding were a subject of particular average and must be borne by the ship.

CLIFFORD, J.—With a full cargo on board, the ship sailed for her port of destination on the day alleged in the pleadings; and during the voyage, to wit, on the 14th of April following, it was discovered that great quantities of smoke and vapor were issuing from the fore and after hatches of the ship. She was proceeding on her voyage at the time the discovery was made, in latitude forty-six degrees south, longitude fifty-three degrees west, but the weather was squally, and the sea was rough. Precautions, such as are usual on such occasions, were immediately adopted: the hatches were fastened down, and “everything made tight,” in order to check as much as possible

the progress of the fire, at least until a port of succor could be reached.

Great alarm was felt, and the fears of all were much increased by the fact, well known to all, that the cargo contained prepared gunpowder and large quantities of spirituous liquors. Under the circumstances the crew refused to continue the voyage, and the master determined, very properly, as the parties agree, to make for the Bay of San Antonio, on the south-east coast of Patagonia, as the nearest anchorage, and at the end of four days the ship arrived off that bay and set the usual signal for a pilot.

Throughout that period the signs of fire continued to increase; and in getting up the chains, so as to be ready to cast anchor without delay, they were found to be quite hot, and there were other indications of fire, which greatly heightened the general alarm. Unwilling to run into a bay unknown to him, without a pilot, the master set his signal as aforesaid and waited three hours for one; but no one came, and it became evident that none could be expected, as the coast was wild and desolate.

Something must be done, as the alarm increased as the impending peril became more imminent. Haul off the master could not, as the wind and waves were against any such movement. He could not resume the voyage for the same reason, and also because the crew utterly refused their co-operation; nor could he with safety any longer attempt to "lie to," as the ship was gradually approaching the shore, and because she was exposed both to the impending peril of fire on board, and to the danger, scarcely less imminent, of shipwreck from the wind and waves. Nothing, therefore, remained for the master to do, which it was within his power to accomplish, but to run the vessel ashore—which it is agreed by the parties would have resulted in the "certain, and almost instant loss of vessel, cargo, and all on board"—or to make the attempt to run into the bay without the assistance of a pilot. Evidently he would have been faithless to every interest committed to his charge if he had attempted to beach the vessel at that time and place, as the agreed statement shows that the weather was rough, that the wind was high and blowing toward the land with a heavy sea, and that the shore was rocky and precipitous.

What the master did on the occasion is well described by the parties in the agreed statement, in which they say he at length determined, as the best thing to be done for the general safety, and especially for the preservation of the cargo and the lives of those on board, to make the attempt to run in without a pilot, preferring all risks to be thereby incurred rather than to remain outside in the momentary apprehension of destruction to all; and the parties agree that he was fully justified in his decision as tested by all the circumstances, although the ship in attempting to enter the bay grounded on a reef, and before she could be got to sea again sprung a leak and sustained very serious injuries in her bottom.

Great success, however, attended the movement, notwithstanding those injuries, as the water taken in by the ship extinguished the fire, and the ship remained fast and secure from shipwreck until the winds subsided and the sea became calm.

Repairs could not be made at that place, and the parties agree that the injuries to the ship were such as fully justified the master in returning to Montevideo for that purpose, as that was the nearest port where the repairs could be made. He arrived there on the twenty-seventh of the same month, and it appears by the agreed statement that the just and necessary expenses incurred by the ship at that port to enable her to resume the voyage were one hundred thousand dollars, including repairs, unloading, warehousing, and reloading of the cargo, and that the master, being without funds or credit, was obliged to sell a considerable portion of the cargo to defray those expenses.

Repaired and rendered seaworthy by those means, the ship on the 11th of September in the same year resumed her voyage, and arrived at her port of destination on the 7th of December following; and the master, without unnecessary delay, delivered the residue of the shipments in good order to the respective consignees, as required by the contract of affreightment.

General average contribution is defined to be a contribution by all the parties in a sea adventure, to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of

the parties for the general benefit of all the interests embarked in the enterprise. Losses which give a claim to general average are usually divided into two great classes: (1) Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing; (2) those which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo.

Common justice dictates that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger, or incurs extraordinary expenses to promote the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure.

Where expenses are incurred or sacrifices made on account of the ship, freight, and cargo, by the owner of either, the owners of the other interests are bound to make contribution in the proportion of the value of their several interests; but in order to constitute a basis for such a claim it must appear that the expenses or sacrifices were occasioned by an apparently imminent peril, that they were of an extraordinary character, that they were voluntarily made with a view to the general safety, and that they accomplished or aided at least in the accomplishment of that purpose.

Authorities may be found which attempt to qualify this rule, and assert, that, where the situation of the ship was such that the whole adventure would certainly and unavoidably have been lost if the sacrifice in question had not been made, the party making it cannot claim to be compensated by the other interests, because it is said that a thing cannot be regarded as having been sacrificed which had already ceased to have any value; but the correctness of the position cannot be admitted unless it appears that the thing itself for which contribution is claimed was so situated that it could not possibly have been saved, and that its sacrifice did not contribute to the safety of the crew, ship, or cargo. Sacrifices where there is no peril present no claim for contribution; but the greater and more imminent the peril, the more meritorious the claim for such contribution, if the sacrifice was voluntary and contributed to save the associated interests from the impending danger to which the same were exposed.

Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril, and which were saved from the common danger by the sacrifice. Much is deferred in such an emergency to the judgment and decision of the master; but the authorities everywhere agree that three things must concur in order to constitute a valid claim for general average contribution: First, there must be a common danger to which the ship, cargo, and crew were all exposed; and that danger must be imminent and apparently inevitable, except by incurring a loss of a portion of the associated interests to save the remainder. Secondly, there must be the voluntary sacrifice of a part for the benefit of the whole; as, for example, a voluntary jettison or casting away of some portion of the associated interests for the purpose of avoiding the common peril, or a voluntary transfer of the common peril from the whole to a particular portion of those interests. Thirdly, the attempt so made to avoid the common peril to which all those interests were exposed must be to some practical extent successful; for, if nothing is saved, there cannot be any such contribution in any case.¹

Equity requires, says Emerigon, that in these cases those whose effects have been preserved by the loss of the merchandise of others shall contribute to this damage, and commercial policy as well as equity favors the principle of contribution, as it encourages the owner, if present, to consent that his property, or some portion of it, may be cast away or exposed to peculiar and special danger to save the associated interests and the lives of those on board from impending destruction; and, if not present, the moral tendency of the well-known commercial usage is to induce the master to exercise an independent judgment in the emergency, for the benefit of all concerned.

Masters are often compelled, in the performance of their duties, to choose between the probable consequences of immi-

¹ While this is true, some authorities maintain that the success need not be shown to have been *caused* by the sacrifice in order to establish a right to general average contribution, but that it is enough if the circumstances existing at the time of such sacrifice justified a general average act. Arnould, Mar. Ins., p. 854 (6th ed., 1887). See § 119, *supra*.

nent perils threatening the loss of the ship, cargo, and all on board, and a sacrifice of some portion of the associated interests in their custody and under their control, as the only means of averting the dangers of the impending peril in their power to employ. They must elect in such an emergency, and if they, in the exercise of their best skill and judgment, decide that it is their duty to lighten the ship, cut away the masts, or to strand the vessel, courts of justice are not inclined to overrule their determinations.

Owners of vessels are under obligation to employ masters of reasonable skill and judgment in the performance of their duties; but they do not contract that they shall possess such qualities in an extraordinary degree, nor that they shall do in any given emergency what, after the event, others may think would have been best. From the necessity of the case, the law imposes upon the master the duty, and clothes him with the power, to judge and determine, at the time, whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a portion of the associated interests indispensable for the common safety of the remainder. Standing upon the deck of the vessel, with a full knowledge of her strength and condition, and of the state of the elements which threaten a common destruction, he can best decide in the emergency what the necessities of the moment require to save the lives of those on board and the property intrusted to his care; and if he is a competent master, if an emergency actually existed calling for a decision whether such sacrifice was required, and if he appears to have arrived at his conclusion with due deliberation, by a fair exercise of his own skill and judgment, with no unreasonable timidity, and with an honest intent to do his duty, it must be presumed, in the absence of proof to the contrary, that his decision was wisely and properly made.

Controversies respecting the allowance or adjustment of general average more frequently arise in cases where the sacrifice made consisted of a jettison of a portion of the cargo than in respect to any other disaster in navigation.

Explanations and illustrations upon the subject, therefore, whether found in treatises or in judicial decisions, are usually more particularly applicable to cases of that description than

to a case where the vessel was stranded ; but the leading principles of law by which the rights of parties are to be ascertained and determined in such cases are the same whether the sacrifice made consisted of a part of the cargo or of a part or the whole of the ship, as the controlling rule is, that what is given for the general benefit of all shall be made good by the contribution of all, which is the germ and substance of all the law upon the subject. Doubts at one time were entertained whether a loss occasioned by a voluntary stranding of the vessel, even though it was made for the general safety, and to avoid the probable consequences of an imminent peril to the whole adventure, was the proper subject of general average contribution ; but those doubts have long since been dissipated in most jurisdictions, and they have no place whatever in the jurisprudence of the United States.

Where the ship is voluntarily run ashore to avoid capture, foundering, or shipwreck, and she is afterwards recovered so as to be able to perform her voyage, the loss resulting from the stranding, says Mr. Arnould, is to be made good by general average contribution ; and the writer adds that there is no rule more clearly established than this by the uniform course of maritime law and usage.

Sustained as that proposition is at the present day by universal consent,¹ it does not seem to be necessary to refer to other authorities in its support, nor is it necessary to enlarge that rule in order to dispose of the present controversy ; but to prevent any misconception as to the views of the court it is deemed proper to add that it is settled law in this court that the case is one for general average, although the ship was totally lost, if the stranding was voluntary and was designed for the common safety, and it appears that the act of stranding resulted in saving the cargo.

Undoubtedly the sacrifice must be voluntary and must have been intended as a means of saving the remaining property of the adventure, and the lives of those on board, and unless such

¹ This statement of the learned court is not quite accurate. See the able defense of a contrary view in the *Enc. Brit.*, subject *General Average* ; and also *York Antwerp Rules*. § 125, *supra* ; *Maclachan on Shipping*, p. 623 ; *Gourlie, Gen. Av.*, pp. 133, 135. The custom of *Lloyd's* excludes damage from voluntary stranding. *Owen, Mar. Ins.*, p. 271 (1890).

was the purpose of the act it gives no claim for contribution ; but it is not necessary that there should have been any intention to destroy the thing or things cast away, as no such intention is ever supposed to exist. On the contrary, it is sufficient that the property was selected to suffer the common peril in the place of the whole of the associated interests, that the remainder might be saved.

Suggestion is made that the act of stranding of the vessel in this case was not a voluntary act, as the reef where she grounded was not visible at the time and was unknown to the master ; but the agreed statement shows that in undertaking to run into the bay the master knew that the chief risk he had to encounter was the stranding of the ship, and the precautions which he took to guard against that danger show to the entire satisfaction of the court that the disaster was not altogether unexpected. As the ship advanced, the lead was constantly employed, showing eight fathoms at first, then seven, then six only, and so on ; the depth continuing to diminish at each throw of the lead, until the ship grounded and remained fast.

Grant that the master did not intend that the ship should ground on that reef, still it is clear that he was aware that such a danger was the chief one he had to encounter in entering the bay, and the case shows that he deliberately elected and decided to take that hazard rather than to remain outside, where, in his judgment, the whole interests under his control, and the lives of all on board, were exposed to imminent peril if not to certain destruction. Under these circumstances it is not possible to decide that the will of man did not in some degree contribute to the stranding of the ship, which is all that is required to constitute the stranding a voluntary act within the meaning of the commercial law.

Suppose the storm outside the bay was irresistible and overpowering, still it does not follow that there was no exercise of judgment, for there may be a choice of perils when there is no possibility of perfect safety.

Destruction of all the interests was apparently certain if the ship remained outside, but the master under the circumstances elected to enter the bay without the assistance of a pilot, knowing that there was great danger that the ship might ground in the attempt ; but his decision was, that it was better

for all concerned to make the attempt than to remain where he was, even if she did ground : and the result shows that he decided wisely for all interests, as damage resulted to none except to the ship, and she would doubtless have been destroyed if she had continued to remain outside of the bay.

Guided by these considerations, our conclusion is, that the loss and damage sustained by the ship at the place of the disaster, and the costs and expenses of the repairs—and all the other costs and expenses as charged in the adjustment—are the proper subject of general average contribution, as alleged by the claimants in their answer.

Details will be avoided, as the decree must be reversed, and the cause remanded for further proceedings.

Brief consideration must also be given to the exceptions, taken by the claimants, to the report of the commissioner, which were overruled by the court.

1. That the commissioner erred in assuming that the valuation of the ship, as given in the policy of insurance, is the proper basis of her contributory value in the statement of the amount for general average.

As a general rule, the value of the ship for contribution, where she has received no extraordinary injuries during the voyage, and has not been repaired on that account, is her value at the time of her arrival at the termination of her voyage ; but if she met with damage before she arrived, by perils of the sea, and had been repaired, then the value to be assumed in the adjustment is her worth before such repairs were made. Neither party gave any evidence as to the value of the ship prior to the disaster, except what appears in the policy of insurance, and, under the circumstances, it is difficult to see what better rule can be prescribed than that adopted by the commissioner.

Strictly speaking, the rule is the value of the ship antecedent to the injuries received ; but, as that requirement can seldom be met, the usual resort is her value at the port of departure, making such deduction for deterioration as appears to be just and reasonable.

No proof on that subject, except the policy of insurance, was offered by either party, and, inasmuch as ships are seldom insured beyond their actual value, the exception is overruled.

2. That the commissioner erred in carrying into particular average certain expenses incurred by the master at the port where the repairs were made, which should have been regarded as the proper subject of general average.

We think it plain that the exception must be sustained, as some of the matters charged as particular average, in whole or in part, ought clearly to have been included at their full value among the incidental expenses necessarily incurred in making the repairs.

Whatever the nature of the injury to the ship may be, and whether it arose from the act of the master in voluntarily sacrificing a part of it or in voluntarily stranding the vessel, the wages and provisions of the master, officers, and crew from the time of putting away for the port of succor, and every expense necessarily incurred during the detention for the benefit of all concerned, are general average.

Repairs necessary to remove the inability of the ship to proceed on her voyage are now regarded everywhere as the proper subject of general average. Expenses for repairs, beyond what is reasonably necessary for that purpose, are not so regarded.

The wages and provisions of the master, officers, and crew are general average from the time the disaster occurs until the ship resumes her voyage, if proper diligence is employed in making the repairs.

Towing the ship into port, and extra expenses necessarily incurred in pumping to keep her afloat until the leaks can be stopped, are to be included in the adjustment.

Surveys, port charges, the hire of anchors, cables, boats, and other necessary apparatus, for temporary purposes in making the repairs, are all to be taken into the account, as well as the expenses of unloading, warehousing, and reloading the cargo after the repairs are completed.

Repairs in such a case cannot be made by the master unless he has means or credit; and if he has neither, and his situation is such that he cannot communicate with the owners, he may sell a part of the cargo for that purpose, if it is necessary for him to do so in order to raise the means to make the repairs. Sacrifices made to raise such means are the subject of general average, and the rule is the same whether the sacrifice was

made by a sale of a part of the cargo, or by the payment of marine interest.

Governed by these rules, it is believed the rights of the parties may be adjusted without serious difficulty or danger of mistake.

Decree reversed.

CHAPTER XI.

NEW YORK STANDARD FIRE POLICY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1852.

SCRIPTURE v. LOWELL MUTUAL FIRE INS. CO.

(10 Cush. 356.)

What is loss by fire.

ACTION on a policy of insurance on a dwelling-house owned by plaintiff, but occupied by one Elbridge Smith, whose minor son, without plaintiff's knowledge, brought a cask of gunpowder into the attic and fired it with a match, doing considerable damage.

Perkins, J., in the Court of Common Pleas, gave plaintiff judgment for the total damage done, on an agreed statement of facts, and defendants appealed to this court.

CUSHING, J.—The case finds that a burning match being applied, without fault of the plaintiff, to a cask of gunpowder in the attic of his house, the gunpowder took fire, exploded, set fire to a bed and clothing, charred and stained some of the woodwork, and blew off the roof of the house; and the only question in the case is, whether the loss thus occasioned to the building is covered by the conditions of an ordinary policy against fire. The question may be generalized thus: By the ignition of gunpowder within a dwelling-house, damage is done to the house, that damage consisting in part of combustion and in part of explosion. Is the *whole* damage covered by a policy insuring “against loss or damage by fire?”

The very anomalous case of *Austin v. Drew*, 6 Taunt. 436, has been adduced in argument and greatly relied upon, as having apparent analogy to this; but when that case is examined,

the analogy disappears. The evidence there was, of a building of several stories, in each of which sugar, in a certain state of preparation, was deposited for the purpose of being refined; and a chimney, running up through the building, formed almost one whole side of each of the stories; and by means of this chimney, heat was communicated to the several rooms containing the sugar, and thus acted on it chemically. At the top of the chimney was a register used to shut in the heat during the night. The servant of the assured, in lighting the fires in the morning, neglected to open the register, in consequence of which, undue heat came out into the heating-room, and the sugars were thereby injured. And the action pending, was to recover damage for this under a policy of insurance against loss by fire.

The decision in *Austin v. Drew* has been assumed to establish that, "to bring a loss within the risk insured against, it must appear to have been occasioned by actual ignition, and no damage occasioned by mere heat, however intense, will be within the policy." 2 Marsh. on Ins. (3d ed.) 790. This proposition is not the point of the case; and it cannot be sound law; for it may well happen that serious damage, within the scope of a fire policy, shall be done to a building, or to its contents, by the action of fire in scorching paint, cracking pictures, glass, furniture, mantelpieces, and other objects, or heating and thus actually destroying many objects of commerce, and yet all this without actual ignition—that is, visible inflammation.

All these manifest errors, and the doubts they throw over the case of *Austin v. Drew*, are dispelled at once by the report of it in Holt and in Campbell, as it was tried at Nisi Prius. There it appears that the claim was for damage to the sugars by overheating only. And Chief Justice Gibbs said: "I am of opinion that this action is not maintainable. There was no more fire than always exists when the manufacture was going on. Nothing was consumed by fire. The plaintiffs' loss arose from the negligent management of their machinery. The sugars were chiefly damaged by the heat. And what produced the heat? Not any fire against which the company insured, but the fire for heating the pans, which continued all the time to burn without any excess. The servant forgets to open the register by which the smoke ought to have escaped and the

heat to have been tempered." And when one of the jurymen suggested that fires arising from negligence of servants were covered by fire policies, Chief Justice Gibbs assented, and said it was not the case of a fire arising from negligence, for there was no fire except where it ought to have been; but it was the case of the damage of an article in the process of manufacture by the unskillful management of the fire used as an agent of the manufacture. *Austin v. Drew*, 4 Campb. 360; Holt N. P. 126.

If, in *Austin v. Drew*, the fire had been where it ought not to be, if, even with careless management, it had burned the building, and notwithstanding it was fire maintained only for the purpose of manufacture, then all the observations of the court go to show that, in this instance, as in that of the whaleship mentioned in Emerigon (1 Tr. de Ass. 436), the insurers would have been held to be liable for the loss. This, therefore, and this only, as correctly stated by Beaumont (Ins. 37), is decided by the case of *Austin v. Drew*; namely, that where a chemist, artisan, or manufacturer, employs fire as a chemical agent, or as an instrument of art or fabrication, and the article, which is thus purposely subjected to the action of fire, is damaged in the process by the unskillfulness of the operator, and his mismanagement of heat as an agent or instrument of manufacture, that is not a loss within a fire policy. This, we apprehend, is good policy and sound law. But it does not touch at all the present case. It has been thought proper thus to analyze the case of *Austin v. Drew*, because, having been variously reported by four different reporters, and presenting itself prominently in several of the text-books, but in nearly all of them with more or less of misconception, it has become the starting point, in legal construction, of conflicting lines of argument leading to sundry false conclusions, and, among others, that of a supposed application to the present question.

Some adjudications have also been cited of questions arising in the contingency of damage done by lightning. Thus, in *Kenniston v. Merrimack Insurance Company*, the Supreme Court of New Hampshire decided that damage done by lightning, without any combustion to indicate the presence of fire, is not within the terms of a policy against "fire by accident, lightning, or by any other means"; the court, in a brief opin-

ion, deducing the conclusion from the assumed premises that lightning *per se* is not fire. 14 N. H. 341. The same conclusion, upon similar facts and upon the same words of insurance, "fire by lightning," is elaborately reasoned out in a recent case in New York, *Babcock v. Montgomery County Insurance Company*, 6 Barb. 637; where it is held, that, to constitute a loss within the policy, there must be fire, or burning, and that damage by lightning in other forms is not the risk intended by the contract; because, though caloric may generate electricity, or electricity caloric, yet caloric and electricity are distinct things in nature.

The principle adjudged in the cases of this class will be readily seen by reversing the question. Suppose, not as fact but as mere supposition, a policy insuring against damage done through electricity generated by caloric. Obviously, this would not cover damage done by fire only, electricity not being evolved. So, in the actual case reported, of insurance against fire produced by lightning, if the effects be of lightning only, without exhibition of fire, it would not, according to the above decision, be within the policy. Or suppose insurance on cattle against the risk of death by fire alone. In that assumption, if the cattle die, as they may, by a stroke of lightning, without a burn or any other action of fire on their bodies, it would not be the risk contemplated by the contract. *Beaumont on Ins.* 37.

The question of loss by lightning is very summarily disposed of in the older authorities by treating electricity as fire from heaven. See 1 Emerigon, c. 12, § 17, No. 1, and the authors there cited. But the progress of knowledge has led to juster notions of the nature of lightning, and, of course, to different conclusions touching its legal relations, which are correctly summed up by a late writer as follows: namely, that fire includes lightning if there be any mark of fire, but not otherwise. *Beaumont on Ins.* 37.

These cases of damage by lightning bear on the present question, therefore, if at all, only by very distant analogy. Neither of them covers it or has any direct relation to it. To the contrary of this, in New York, at least, the same courts which decide that loss by lightning merely is not covered by a fire policy, decide that loss by the explosion of gunpowder is.

There is a series of cases precisely in point which expressly decide, or by implication assume, that damage done by the explosion of gunpowder ignited within a building, as well as that done by its combustion, is within the risk of a fire policy. The case of *Grim v. Phœnix Insurance Company* was this: A vessel, insured against fire, was partly laden with gunpowder, which, being ignited by carelessness, the vessel was blown up and totally lost. It was argued by eminent counsel, and the opinion was given by Thompson, C. J., and throughout the case it seems to be assumed that the loss was, in respect to its cause, within the policy, and the decision was made to depend on other considerations, 13 Johns. 451. The same conclusion is also assumed in the case of *Duncan v. Sun Fire Insurance Company*, 6 Wend. 488. In the case of *City Fire Insurance Company v. Corlies*, the claim was on a fire policy for merchandise destroyed not in burning, but through the blowing up of the building wherein it was stored, by means of gunpowder; and the court expressly adjudged this to be "a loss by the peril insured against, within the meaning of the policy." 21 Wend. 367.

The question, we admit, is a nice one. Upon careful reflection, however, we have come to the conclusion that the received opinions on the subject and the adjudications referred to are in accordance with reason and principle. It seems not to be denied that actual combustion, produced by the ignition of gunpowder, is within the present policy. If, then, a combustible substance in the process of combustion produces explosion also, it is not easy to perceive why, of the two diverse but concurrent results of the combustion, the one should be ascribed to fire any less than the other. The plain fact here is the application of fire to a substance susceptible of ignition, the consequent ignition of that substance, and immediate damage to the premises thereby. It is no sufficient answer to say that some of the phenomena produced are in the form of explosion. All the effects, whatever they may be in form, are the natural results of the combustion of a combustible substance; and, as the combustion is the action of fire, this must be held to be the proximate and legal cause of all the damage done to the premises of the plaintiff.

Our opinion excludes, of course, all damage by mere explo-

sion, not involving ignition and combustion of the agent of explosion, such as the case of steam, or any other substance acting by expansion without combustion. See *Perrin's Administrator v. Protection Insurance Co.*, 11 Ohio, 146. It likewise excludes all damage occasioned but remotely or consequentially through the agency of gunpowder, such as injury done to a house by falling fragments in the blasting of rocks, or the shattering of a house by the stroke of a cannon-ball, in which examples the shock of a projectile, and not ignition or combustion, is the proximate cause of the damage done. We recognize and accept, in the full force of its application, the maxim: *In jure non remota causa sed proxima spectatur.* Bacon's Max. 1.

The legal relations of marine insurance have been copiously discussed in many express treaties of elaborate erudition, and are considered in a great number of judicial decisions, in which the whole subject has been explored with wonderful acuteness and comprehension of logic and of learning; while fire insurance, as a branch of legal knowledge, is, comparatively speaking, in its rudiments. The cases on marine insurance throw little if any light on the present question, except in so far as they attempt to prescribe a rule for distinguishing between what is remote and what is proximate cause. The conclusion reached in this discussion, as may be seen by the latest investigation of the point in Great Britain, *Montoya v. London Assurance Co.*, 6 Exch. 451, is that, while for most cases it is practicable to draw the line, and to formalize a rule between the two classes of causes, yet, in other cases, according to the general law of nature, the two classes approach and run into one another until the distinction vanishes; and within the limits of this debatable land of differences, it is necessary to apply judicial discretion to the particular questions as they arise, just as it is in the not infrequent inquiry whether a thing, or the use or measure of it, be reasonable or not. In *Montoya v. London Assurance Co.*, it was determined that, where the lower part of a cargo is damaged by sea water and, by the evolution of gases from the part thus damaged or the propagation of heat arising from fermentation, the superior part of the cargo be damaged also, the loss on the latter is by the perils of the sea, the involvement of the secondary effect in the primary one being an example of *causa proxima*.

In the present case there is no room for question concerning a series of causes, as whether primary or secondary, proximate or remote; for the agent is one and the same throughout, namely, fire. The *causa* was burning powder; the *causa causans* was a burning match; at each stage of causation it was the action of fire. Nay, to be exact, the burning of the gunpowder, like the burning of the match, was a succession of several complex acts of burning, yet fire is the agent at each of these distinct stages of causation. Suppose there was a barrel of sulphur in the plaintiff's attic instead of gunpowder, and this being ignited with a match, afterwards the fire had passed from the burning sulphur to the substance of the house. This would be recognized at once as a case of fire. It does not change the legal relation of causes to substitute a barrel of burning gunpowder for a barrel of burning sulphur. The only difference in the elements of the question is, that the gunpowder, when ignited, consumes with more of rapidity than sulphur, and the combustion is accompanied or followed by explosion. Still, the agent is fire, though it acts in different ways upon the different successive subjects of its action, beginning with the match and terminating with the plaintiff's house.

On the other hand, cases are conceivable, other than by the use of gunpowder, of explosion without any combustion, which, nevertheless, being the result of the action of fire, are still, it would seem, within the range of the general principle. Various mineral substances exist, of value in commerce and the arts, which explode by the action of fire, without either ignition or combustion. In general, any close vessel of whatever material composed, when filled with an expansive fluid, is liable to explode by the action of heat, though it may be that the vessel and its contents are alike incombustible. The same thing happens, under certain conditions, to some forms of wood; which, although combustible, may by the action of fire explode, without ignition; or which, as in the present case, of a house, by having compressed within it some burning substance, which is explosive as well as combustible, like gunpowder, may suffer the double injury of combustion in part and in part of explosion.

If, however, the question of consequential damage needed to be explored for the determination of the present case, it

would serve to confirm the conclusion at which we have on other premises arrived. Thus, in Great Britain, damage which occurs consequentially in the case of a fire, by reason of confusion of mind, as in throwing fragile objects out of the window, or by sudden terror from alarm, as in leaving open the top of a barrel, and thus wasting the contents, is held to be loss by fire, according to the usages of insurance offices or established legal principle. Beaumont on Ins. 41. So it is in the case of a beam, cornice, or coving, removed to prevent the spread of conflagration. *Ibid.* We understand the same to be the rule, in the case, for instance, of a fire in the upper story of a building, and the destruction or damage of goods in a lower story, not by fire, but by the water thrown into or upon the building for the purpose of extinguishing the fire. All these are fit illustrations of the question of merely consequential damage.

In the hypothesis that fire is to be regarded as *causa proxima* in the present case we can see but one supposable defect; namely, the suggestion that, though it be conceded that the explosion of burning gunpowder, and its effects, are the action of fire, yet this particular effect on the building is not exhibited in the form of igneous action. The cases above supposed, of the shrivelling of some masterpiece of pictorial art, the cracking or discoloration of a rich vase or gem, the bursting of a cask of wine through the expansion of its contents, these, it may be said, are distinctly cases of damage, without ignition it is true, but by the direct and specific action of heat as such; while it is denied that such is the fact in the present case of the blowing up of a dwelling-house by the ignition of gunpowder. We do not think the premises of this argument are sustained by the physical facts which occurred. If they were so, then the nearest analogy would be of damage by smoke; that is, the moisture thrown off by burning wood, and carrying with it ashes, empyreumatic oil, and other constituent parts of the wood, either in their natural condition, or transformed by the process of combustion. Now it is obvious that mere smoke, without any direct action of heat, may do great damage to many kinds of merchandise, such as delicate textile fabrics, esculent vegetables, articles of taste, and other numerous objects; and if a dwelling or a magazine take fire, and some parts of it only be consumed, but the contents of apartments, to which the actual fire does

not extend, are nevertheless damaged by the smoke penetrating into and filling them, can it be doubted that the damage thus done is a loss within the ordinary conditions of a fire policy? *Seem*, per Gibbs, Chief Justice, *arguendo*, in *Austin v. Drew*, Holt N. P. 127. Yet, incontestably, damage by smoke is an effect, which is not in itself igneous action, though it be the result thereof; while, as we conceive, the explosion of gun-powder is igneous action.

In conclusion, we think the rule, which we propose for the present case, reconciles all the conditions involved in the question; is conformable to the nature of things; and constitutes a coherent and consistent doctrine, namely, that where the effects produced are the immediate results of the action of a burning substance in contact with a building, it is immaterial whether these results manifest themselves in the form of combustion, or of explosion, or of both combined. In either case, the damage occurring is by the action of fire, and covered by the ordinary terms of a policy against loss by fire.

Judgment for the plaintiff.

SUPREME COURT OF RHODE ISLAND, 1883.

LYONS V. PROVIDENCE WASHINGTON INS. CO.

(14 R. I. 110.)

Location, when material.

CARPENTER, J.—The plaintiff proved in the trial of this case in the Court of Common Pleas that she procured from the defendant a policy of insurance against fire, on certain articles of furniture and wearing apparel, described in the policy as “All contained in house No. —, McMillen Street, Providence, R. I. ;” that at the time of the fire the articles had been removed and were in a house on Power Street, where the fire occurred; that the defendants had never been informed of the removal; that she never told them of the removal, and did not think it was necessary to tell them, and that at the time she procured the policy of insurance she owned the house on McMillen Street, in which the articles insured then were. In this state of the proof the defendant requested the presiding justice to instruct

the jury that the permanent removal of the goods insured from the house on McMillen Street to the house on Power Street, without the knowledge and assent of the defendant corporation, terminated the contract of insurance, and that the plaintiff could not recover. The presiding justice refused such instruction, whereupon a verdict was returned for the plaintiff, and the defendant brings this bill of exceptions.

There seems to be no doubt that if this question were to be decided on authority, it must be taken as the general rule that all the material statements of the policy of insurance, including statements as to the place in which the insured property is situate, are warranties, and that such warranties must be true and must continue to be true during the whole life of the policy as the condition of any recovery thereunder. *Eddy Street Iron Foundry v. Hampden Stock and Mutual Ins. Co.*, 1 Cliff. 300; *Shertzer v. Mutual Fire Ins. Co. of Hartford County*, 46 Md. 506; *Wall v. East River Mutual Ins. Co.*, 3 Seld. 370; *Hartford Fire Ins. Co. v. Farrish*, 73 Ill. 166.

The plaintiff, however, contends that this case comes within an exception to the general rule. The argument is, that inasmuch as the insured property is household and personal effects, and inasmuch as it is matter of common knowledge that certain persons do at times change their place of abode, carrying with them such of their effects as are of the kind here insured, therefore, it is to be presumed that the defendant issued the policy in suit with the knowledge and expectation that the plaintiff might make such removal during the term of the insurance, and with the implied agreement that she might make such removal without vitiating the policy. There is, indeed, to be deduced from the cases an exception to the general rule as above stated; but we do not think that, either in reason or on authority, it goes to the extent claimed by the plaintiff. Briefly stated, the rule seems to be that the temporary removal of property, whether occasional or habitual, in pursuance of a use which is a "certain necessary consequence" arising from the character of the property, without any change in the ordinary place of keeping, will be no defense to an action on the policy. The reasoning of Lord Mansfield, although in case of marine insurance, applies exactly to this question. *Pelly v. Governor & Company of the Royal Exchange Assur-*

ance, 1 Burr. 341 ; *Holbrook v. St. Paul Fire & Marine Ins. Co.*, 25 Minn. 229.

The plaintiff further contends that the general rule above laid down is not founded in justice and sound reason, and ought not to be adopted in this case. The argument is, that no person not learned in the purport of judicial decisions could know or infer that the words of the policy above quoted, which are in appearance merely descriptive, imported a warranty ; and that, therefore, they should not now be so construed. We cannot agree with this argument. We must assume that the words of a written instrument conveyed to the minds of the parties to that instrument the meaning and effect which have been imputed to those words by well-established judicial determinations. Undoubtedly such determinations, if they are to remain as authority, must appear to be based on the words themselves, or on something in the nature, circumstances, or relations of the parties or of the contract. We think the interpretation of the words of this policy as a warranty is well drawn from the nature of the contract of insurance. It must be evident to any person who at all considers the nature of that contract, that the amount to be charged for premium must vary on consideration of the location of the property to be insured ; and but small reflection would be necessary to perceive that the removal of the property to another place might be greatly to the disadvantage of the insurer, although such new place of deposit might not be in itself more exposed to damage from fire, since the result of such removals, if permitted to a considerable extent, might be to expose an undue proportion of his capital to the risks of a single conflagration.

Exceptions sustained.

CHAPTER XII.

CLAUSES OF THE NEW YORK STANDARD FIRE POLICY—CONTINUED.

NEW YORK COURT OF APPEALS, 1881.

LANDERS v. WATERTOWN FIRE INS. CO.

(86 N. Y. 414.)

Other insurance, valid or invalid.

ANDREWS, J.—The policy on which this action is brought, was issued on or about August 1, 1873, and contains a condition that, “if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, not indorsed hereon, or consented to by this company or its authorized agent, in writing, this policy shall be void.” The answer avers a breach of this condition, and alleges that, at the time the policy was issued, the house insured was covered by a prior policy, issued to the plaintiff in the Glens Falls Insurance Company, for \$800, terminating May 1, 1874, the existence of which was not communicated to, or known by the defendant. It was proved that the plaintiff, in May, 1871, procured an insurance on the house, in the Glens Falls Insurance Company, for \$800, for the term of three years from May 1, 1871, not indorsed on the policy in suit, or consented to by the defendant, or its authorized agent, in writing. The policy in the Glens Falls Company contained a condition, that, if the insured premises should become vacant, and unoccupied, or the risk should be increased, by the erection or occupation of neighboring buildings, or by any means whatever, without the consent of the insurer, indorsed on the policy, it should be void.

The answer made on the trial to the defense of prior insurance was, that, after the policy in the Glens Falls Company was issued, the house remained vacant for several months

without the consent of the insurer, and that the risk had been increased by the plaintiff's having put into a mill, near the insured premises, an engine and boiler. The vacancy, and the increase of risk by the putting in of the engine and boiler, were proved. The policy in the Glens Falls Company had not, however, been canceled by the company, nor did it appear that the company knew of the vacancy, or increase of risk. The plaintiff did not discover the provision in the policy of the Glens Falls Company, avoiding it for these causes, until after the fire. He procured the policy in the defendant's company, for the reason that he supposed, although erroneously, that the term for which the policy in the Glens Falls Company was issued had expired, or was about expiring.

The court, on the trial, overruled the defense based on the prior insurance, on the ground that the policy in the Glens Falls Company had become void, in consequence of the vacancy and increase of risk, and, consequently, that there was no prior insurance when the defendant's policy was issued. In this ruling, the court, we think, erred.

The prior policy was valid when issued, but was avoidable by the company issuing it, for breach of condition subsequent. But the company had not elected to avoid it for that reason. It was not certain that it would have so elected, if the facts had been known to it. In some cases, it might be very inequitable for a company to take advantage of the breach of a condition as to vacancy, or increase of risk, to avoid a policy originally valid, although the legal right so to do might be unquestionable. It certainly would be competent for a company to waive such an objection. The first policy was voidable only at the election of the company. The condition was inserted for its benefit, but its violation did not, *ipso facto*, extinguish the policy. The condition in the defendant's policy was inserted to protect it from the hazard of over-insurance, and the existence of the policy in the Glens Falls Company was a breach of the condition.

No question arises in this case as to the rule in case the prior policy had been void in its inception, by non-performance, by the insured, of a condition precedent.

It is claimed that the defendant's agent, when the application for the policy in suit was made, knew of the existence of

the policy in the Glens Falls Company. The defense of prior insurance was not disposed of on this point. That question may be passed upon on a new trial.

The judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

NEW YORK COURT OF APPEALS, 1874.

WILLIAMS v. PEOPLE'S FIRE INS. CO.

(57 N. Y. 274.)

Increase of risk.

DWIGHT, C.—The only point which it will be necessary to consider, in the present case, is, whether the judge at the trial erred in refusing to submit to the jury the question, whether there had been a violation of the conditions of the insurance policy, insuring the plaintiff's goods, by reason of an increase of the risk, owing to the plaintiff's own act.

The condition in the policy, which is claimed by the defendant to have been violated by the plaintiff, is as follows: "If, after insurance has been effected, either by the original policy or the renewal thereof, the *risk shall be increased* by any means whatever within the control of the assured, or if such building or premises shall be occupied, in any way, so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect."

The facts of the case, so far as it is necessary to detail them, as bearing on an alleged increase of risk, show that the property insured was merchandise, contained in a brick building, known as 307 Broadway, in the city of New York. The goods were in a room in the third story. The plaintiff used the room for the purposes of his business, and also as a sleeping-room. Its dimensions were thirteen feet by six feet eight inches. There was a stove in the room, in which fires were kindled from time to time. The plaintiff kept in this room a jug of crude petroleum. It stood on a shelf eight or ten feet from the stove, and would hold a gallon or more. The petroleum was used for medicinal purposes, and, in particular, to cure an

eruption of the skin. When he used the petroleum, he would stand naked before the fire in the stove, and rub himself with the oil. He had done this, from time to time, for five or six months, before the fire. The shirt and drawers which he wore, after making the application, having become saturated with the petroleum, he cast into a box in the room, having a lid upon it. He had worn articles of this kind two nights before the fire. He had made an application of the petroleum to his person on the afternoon of January 30, 1868, and left his place at five o'clock in the afternoon. On this occasion, he had rubbed the oil upon his person before the fire in the stove, as usual. The merchandise was found to be on fire on the morning of January 31, at two and a half o'clock. The petroleum jug contained at the time about two quarts of the oil, and was standing on the shelf, without a cork. The flames did not set the oil on fire. The saturated clothing was not burned or injured. The unburned goods were thrown together in a pile after the fire. There was found in the mass, besides the clothing referred to, some balls saturated with turpentine or kerosene, and there was a strong smell of those substances in the room. There was evidence given by a refiner and dealer in petroleum oils, and who gave testimony as an expert, that crude oil was highly dangerous, and apt to give off, by evaporation, volatile gases which would readily take fire. He stated that there was no comparison, as to danger, between the crude and the volatile oil. He declared that it was dangerous to strike a match in a close room, owing to the presence of the gases and their liability to take fire. He added that the danger would be much increased by the presence of garments saturated with the oil, as there would be more surface exposed for evaporation, and that, in his view, there was danger from the circumstances of the present case. Other experts, called by the plaintiff, wholly contradicted this view. It appeared that the defendant did not know of the use of the petroleum, and did not take risks where petroleum was used, except at very high rates. It belonged to the class of prohibited, or, at the least, to specially hazardous articles. Under these facts, the question should have been left to the jury, whether the acts of the plaintiff had not "increased the risk" under the condition in the policy.

The effect of this clause has been frequently considered by

the courts. It differs from that class of conditions which refer to a state of things existing at the time of the execution of the policy. It looks wholly to the future, and solely concerns the conduct of the assured. It binds him to a rigorous course of conduct as to the observance of existing precautions and the introduction of new sources of danger. The bearing of it is well stated by Chief Justice Shaw in *Houghton v. Manufacturers' Mutual Fire Insurance Co.*, 8 Metcalf, 114, 122. The clause in that case was not precisely in form like the one now under discussion, but was substantially the same. The court said: "This provision binds the assured not only not to make any alteration or change in the structure or use of the property which will increase the risk, but prohibits them from introducing any practice or custom or mode of conducting their business which would materially increase the risk, and also from the discontinuance of any precaution represented in the application to be adopted and practiced with a view to diminish the risk." P. 122; May on Insurance, § 218. The effect of the clause plainly is, that if there be any increase of risk, the plaintiff cannot recover. It is in the nature of a warranty that there shall be no material increase of the risk. *Allen v. Mut. Fire Ins. Co.*, 2 Md. 111; *Mayor of New York v. Hamilton Fire Ins. Co.*, 10 Bosw. 537; *Baxendale v. Harvey*, 4 H. & N. 445. Whether there is such a material increase of the risk or not is a question for the jury. It is urged, however, that there was a special clause in the policy concerning petroleum, and that this covers the whole subject, and thus excludes the application of the "increase of risk" clause to the present case. That clause provides that the sale or storage of crude or refined coal-oil or petroleum, etc., is prohibited within the premises covered by the policy, except by written permission indorsed thereon. It is argued, from this form of expression, that all other forms of use except "sale or storage" are allowed. It is not pretended that this article was kept for sale, and the decisions show that the small amount of petroleum kept in the present case for the purpose indicated is not an instance of "storage." *Hynds v. Schenectady Co. Mut. Ins. Co.*, 11 N. Y. 554; May on Insurance, § 242, and cases cited. Conceding that the true construction of this condition is to allow the act of keeping petroleum when not on sale or storage,

it must still be harmonized with the condition concerning "increase of risk." The risk must not be augmented by any means whatever within the control of the assured. Taking the clauses together, the insured could not fairly claim to use petroleum actively and as an instrument to accomplish some purpose of his own, if the risk was thereby increased. A prohibition of "the sale or storage of gunpowder" would not, by implication, confer the right to fire a pistol among inflammable substances. Suppose that there was a prohibition against the sale or storage of certain chemical substances, not specially dangerous in an inert state, would that cover, by implication, the act of a chemist who should, by combining them into dangerous and explosive compounds, give them a capacity to cause mischief which they did not originally possess? This result could not be claimed, even if there was an express insurance upon such substances. Says a recent author: "A permission to keep kerosene or gunpowder for sale, it is obvious, cannot fairly be construed into a permission to manufacture or use them upon the premises, since the risks in the respective cases may widely differ." *May on Insurance*, § 234.

The plaintiff further insists that the last-named clause is qualified by the following provision: "If the above-mentioned premises shall, during this insurance, be occupied or used so as to increase the risk, or by the occupation of neighboring premises, this company, after notice given to the assured or his or her or their representative, of their intention to terminate the insurance, will refund a ratable portion of the premium." It is claimed that in construing this clause, with the general one on "increase of risk," the result is, that, on such an increase, the company may terminate the insurance by notice, and lose the unearned premium, or by withholding notice save the premium; in which case the insurance continues binding. This construction is inadmissible. It gives no force to the general clause concerning increase of risk by the act of the insured. If that were entirely omitted from the policy, and the clause concerning the right to reduce the premium were inserted, the company would have precisely the same right which the plaintiff insists that he should derive from both the clauses. It would necessarily follow, that, if the defendant did not avail itself of the privilege to reduce the premium, the policy would

stand, and that if the reduction was made, the policy would cease. On this construction, no good reason can be given for two distinct conditions. If the second covers any more acts than the first, they would, naturally, on that supposition, be embraced in a single group of conditions by using some more general form of expression. Again, the proposed construction leaves the insured at liberty to increase the risk and still collect the insurance money, unless such increase happens to come to the knowledge of the insurer; for, in that case alone could notice be given. The true construction is to hold that the two conditions are intended to meet two entirely distinct classes of cases—one, where the increase of risk is occasioned by the act of the insured; the other, where it is caused by the acts of third persons, over whom the insured has no control. In the former case the insurance policy becomes wholly void; in the latter, the insurer reserves to himself an election whether he will continue the insurance, or terminate it; at the same time, in the last event, refunding a proportional part of the premium. This view is taken of two clauses, nearly identical with those under consideration, by the Supreme Court of Massachusetts, in *Allen v. Massasoit Insurance Company*, 99 Mass. 160.

Accordingly, the clause concerning the increase of risk by the act of the insured is a condition precedent, and if the risk has been increased, the plaintiff cannot recover. It is immaterial whether the loss was occasioned by the breach of the condition. There can be no recovery if the condition has been broken, though the fire may have been occasioned by some wholly independent cause. *Flanders on Fire Ins.* 487, and cases cited; *Gardiner v. Piscataquois Mutual Fire Ins. Co.*, 38 Me. 439.

The only question that can be litigated under the condition is, has the risk been in fact increased? That question should have been submitted to the jury. As the judgment should be reversed for this error, it is unnecessary to consider the other points discussed upon the argument.

All concur.

Judgment reversed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1889.

KYTE V. COMMERCIAL UNION ASSURANCE CO.

(149 Mass. 114.)

A temporary breach of warranty vitiates the policy, though not connected with the loss.

Contract upon two policies of fire insurance in the Massachusetts standard form, one upon a dwelling-house and the other upon a barn.

The defense was, that the policy was rendered void by an increase of risk, before the fire occurred. The dwelling-house, which was in process of erection when the policy upon it was issued, contained sixteen rooms, one of which was finished and furnished by the plaintiff as a bar-room, and was occupied by him as a hotel; and the barn was situated near it. There was evidence tending to show that from April, 1882, to July, 1883, the hotel was used by the plaintiff for the illegal sale and keeping for sale of intoxicating liquors, such liquors being seized on the premises on April 7, 1882, and duly forfeited, and the plaintiff being convicted for the illegal sale of such liquors in April, 1883, and again in June of the same year.

The defendant offered evidence tending to show that there was a custom among fire insurance companies doing business in Massachusetts, for many years past, to charge a higher rate of premium for insurance on a building occupied by a person engaged in the business of a common victualer than on a dwelling-house; that a building occupied for the purpose of carrying on the business of a common victualer, and one occupied as an ordinary dwelling-house, belonged to different classes, it being the general custom of insurance companies doing business in this Commonwealth to charge two or three times as much premium on the former as on the latter, and that a much higher premium would be charged for insuring a building in which intoxicating liquors were illegally sold than on one of the same class in which they were not sold.

The judge gave the following instructions, among others, to the jury :

“If it be assumed (and it may be, for the purposes of this trial) that such illegal use would vitiate the policy and deprive

the plaintiff of the right to maintain an action for a loss by fire while the building was being so used, still, if, upon all the evidence in the case, you find that that use was temporary, not contemplated at the time when the policy was taken by the plaintiff, and that such illegal use ceased from and after the time when the plaintiff had a license authorizing him to sell intoxicating liquors, the fact that he made an illegal use of the premises in 1882 will not deprive the plaintiff of the right to maintain the action. His right under the policy, if it was suspended while the illegal use of the building was being made, would revive when he ceased to use the building illegally."

The defendant requested the judge to charge, among other things :

"If you find that, by the illegal sale of intoxicating liquors in this building by the plaintiff Kyte, or by others with his consent and knowledge, for a certain portion of the time for which these policies were issued, the risk was for that period increased—this policy is void as to the plaintiff Kyte's interest, and he cannot recover, although this increase was not permanent and did not cause the fire."

This request was refused.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

C. ALLEN, J.—These policies were in the form of the Massachusetts standard policy, and each provided that, "This policy shall be void . . . if, without such assent [namely, the assent in writing or in print of the company], the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks, . . . or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law." Various other circumstances were enumerated which would also avoid the policy. At the beginning of the trial, the defendant waived every defense except increase of risk. The defense of the illegal keeping of intoxicating liquors, as a separate and distinct defense, was therefore waived.

We have to consider, in the first place, whether the instructions requested by the defendant were given in substance. The

plaintiff contends that they were. The learned judge before whom the case was tried adopted in substance the third and fifth instructions asked for by the defendant, and thus instructed the jury, that if they should find, that during the time for which these policies were issued, the plaintiff Kyte, by obtaining a common victualer's license and making use of this building under said license, and legally or illegally selling intoxicating liquors therein, increased the risk, then this policy became void as to the plaintiff Kyte, and he could not recover for his interest therein; and if they should find, that while these policies were in force intoxicating liquors were kept and sold in this building by the plaintiff Kyte, or with his consent or knowledge, and that thereby the risk was increased, this policy became void as to his interest, and he could not recover. This was a general and broad instruction, including the increase of risk by using the premises as a common victualing place or as a place for selling intoxicating liquors, legally or illegally, and well covered the general question of the effect of an increase of risk. From this instruction, taken alone, a jury might well have inferred that the policy would be void in case of any such increase of risk at any time during the time covered by the policies and before the fire.

But the defendant, in the fourth request for instructions, asked for a special instruction, adapted to the case of a temporary increase of risk which had ceased before the time of the fire; that is to say, that if the jury should find that, by the illegal sale of intoxicating liquors in this building by the plaintiff Kyte, or by others with his consent and knowledge, for a certain portion of the time for which these policies were issued, the risk was for that period increased, this policy would be void as to Kyte's interest, and he could not recover, although this increase was not permanent. The judge declined to give this ruling, and instructed the jury, in substance, that, if that illegal use was temporary, not contemplated at the time when the policy was taken by the plaintiff, and ceased before the fire, then the fact that he had made an illegal use of the premises in 1882, which was during the time covered by the policy, would not deprive the plaintiff of the right to maintain the action; and that his right under the policy, if suspended while the illegal use of the building continued, would revive when he ceased

to use it illegally. This instruction did not in express terms mention the subject of an increase of risk by the illegal use of the premises for selling liquor; but the instruction was given in place of the fourth request for instructions, and that request was refused, the judge saying that he had given what would be entirely inconsistent with it.

The question is thus presented, whether the provision of the policy that it shall be void in case of an increase of risk means that it shall be void only during the time while the increase of risk may last, and may revive again upon the termination of the increase of risk. The provision is, that the policy shall be void if any one of several circumstances successively enumerated shall be found to exist. Some of these circumstances relate to the time of issuing the policy, and others could not arise till afterwards. They are of different degrees of importance, some of them going to the essential matters of the contract, and others being comparatively trivial in character. The language of the policy is the same in respect to them all, that the policy shall be void.

In *Hinckley v. Germania Ins. Co.*, 140 Mass. 38, the policy was in the same form as those in the present cases, and for a short time during the term of the policy the plaintiff kept a bowling alley and billiard table without having any license therefor. There was no question of increase of risk, or other actual prejudice to the insurer; and under these circumstances two questions arose: First, whether the plaintiff's act fell within the provision that the policy should be void if gunpowder or other articles subject to legal restriction should be kept in a manner different from that allowed by law; and, secondly, whether, assuming that the policy would be void during the time of the illegal keeping of the bowling alley and billiard table, it would revive after such temporary use had ceased. In deciding the case, the court intimated that the plaintiff's act was not within the meaning of the provision in the policy, unless the risk was thereby increased, but placed the decision upon the second ground, that the policy would revive. The court now thinks it would have been better to place the decision of this part of the case solely upon the first ground, leaving it an open question whether a departure from the terms of the provision of the policy, without an increase of

risk, may be deemed merely to suspend, and not absolutely to avoid the policy. However that may be, we think an increase of risk entitles the insurer to avoid the policy absolutely. The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed. If the assured, by his voluntary act, increases the risk, and the fact is not known, the result is that he gets an insurance for which he has not paid. In its effect upon the company, it is not much different from a misrepresentation of the condition of the property.

If the provision stood alone, that in case of any material misrepresentation as to the risk or any voluntary increase of risk afterwards the policy should be void, it could hardly be doubted that the words should be taken in their natural, obvious meaning. The fact that with this are coupled the other provisions above referred to does not change its meaning with reference to the effect and consequence of an increase of risk. An increase of risk which is substantial, and which is continued for a considerable period of time, is a direct and certain injury to the insurer, and changes the basis upon which the contract of insurance rests; and since there is a provision that, in case of an increase of risk which is consented to or known by the assured, and not disclosed and the assent of the insurer obtained, the policy shall be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such increase of risk. *Lyman v. State Ins. Co.*, 14 Allen, 329. *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530.

It follows, therefore, that the fourth instruction which was requested, or something in substance like it, should have been given. Upon the facts stated and assumed, the increase of risk, if there was one, continued for fifteen months, and could not be treated as a casual, inadvertent, or inevitable thing.

Exceptions sustained.

CHAPTER XIII.

CLAUSES OF THE NEW YORK STANDARD FIRE POLICY—CONTINUED.

NEW YORK COURT OF APPEALS, 1889.

WALTON AND WIFE v. AGRICULTURAL INS. CO.
(116 N. Y. 326.)

Alienation clause. Change of interest. Shifting of interest among the insured.

THIS action was brought upon a policy of insurance issued by the defendant, to recover the sum of \$500 for loss sustained by the burning of a barn, a quantity of hay and grain, and two horses, covered by the policy.

Said policy contained the following condition: "If the said property be sold or conveyed, or if the interest of the parties therein be changed in any manner, whether by the act of the parties or by operation of law, . . . then, and in every such case and in either of said events, this policy shall be null and void, until the written consent of the company at the home office is obtained."

At the time of the application for, and issuance of the policy, William T. Walton was the owner of the premises insured. About five months thereafter he conveyed said property to a third person, who, on the same day, duly conveyed the same to Eliza D. Walton, the wife of William. Notice of these transfers was never given to the defendant, neither was the written consent of the company at the home office obtained. William T. Walton, against the objection of the defendant, testified that he told the agent, at the time the application for insurance was made, that as soon as he had finished repairing the buildings he should convey the property to his wife, and that he wanted a policy so made out as to cover his interest now and the interest of his wife after conveyance made. The agent replied that he

could accomplish that result by making the policy out to William T. Walton and wife. It was thereupon arranged that such a policy should be applied for, and he signed an application to the company.

The agent or solicitor who made out the application was not a general agent, and did not have authority to issue policies. His duty was to make out applications for insurance and forward them to the home office of the company, where they were passed upon. If rejected, the matter was at an end; if accepted, a policy of insurance was made out and forwarded to the agent for delivery on receipt of premium. Respecting the extent and limitation of the authority of the agent to represent the defendant, the policy in question provided as follows: "Agents of the company are permitted to give the consent of the company to assignment of policies. But no agent of the company is permitted to give consent of the company in any other cases required by the provisions of this policy, or to waive any stipulation or condition contained herein; but in all cases where the consent of the company is required by this policy, other than consent to the assignment of the policy, such consent must be obtained at the home office of the company."

The trial court charged the jury, as a matter of law, that the conveyance from husband to wife through a third person did not vitiate the policy, and that the plaintiffs were entitled to recover. Defendant excepted. Verdict for plaintiffs.

PARKER, J.—The contract of insurance upon which the plaintiffs base their right to recover in this action, provided that if the property insured be sold or conveyed, or if the interest of the parties be changed in any manner, the policy shall be null and void, until the written consent of the company at the home office shall be obtained.

Subsequent to the issuance of the policy the property was conveyed by Walton, through a third person, to his wife without the written consent of the company. Thus, by the terms of the contract, the policy of insurance became of no effect. Upon the trial the plaintiffs sought to relieve themselves from the effect of the violated condition by the introduction of oral evidence tending to show that Walton informed the defendant's solicitor of his intention to convey to his wife after a few

months, and requested that the policy be so drawn as to cover his interest before conveyance and that of his wife afterwards, and that the solicitor informed him that he could accomplish that result by issuing the policy to William T. Walton and wife. The evidence upon that subject was seasonably objected to by the defendant, but was received by the court; and the jury, in a special finding, found the fact to be as contended for by the plaintiffs.

The question presented, therefore, is, can the plaintiffs be permitted to show, in contradiction of the express terms of the contract, that it was orally agreed before its making and delivery that they should be permitted thereafter to do an act which the contract forbids?

This is not an action brought to so reform a contract as that it shall be made to voice the agreement which the parties intended to make. On the contrary, it is based on the policy as it was written, and cannot be maintained by evidence that the contract was intended to be a different one. For a policy of insurance is presumed to embrace the entire agreement of the parties. The precedent oral agreement cannot be regarded as a part of the policy or in any wise effective as a contract. Like other written contracts, the oral agreement, preceding its execution and delivery, is presumed to have become merged in it, and its terms cannot be controlled or varied by parol evidence. *Pindar v. Resolute Fire Ins. Co.*, 47 N. Y. 114; *Ripley v. Aetna Ins. Co.*, 30 id. 136; *Alston v. Mechanics' Mutual Ins. Co.*, 4 Hill, 329.

The cases of *Van Schoick v. Niagara Insurance Company*, 68 N. Y. 434; *Woodruff v. Imperial Insurance Company*, 83 id. 135, and *Short v. Home Insurance Company*, 90 id. 16, are not in conflict with this rule. True, oral evidence was received in each of those cases. It was not received, however, for the purpose of contradicting the written agreement, or to show that the parties made a different contract than the one expressed, but to demonstrate that the insurer, at the time of the issuance of the policy, had knowledge of the facts, the existence of which were asserted upon the trial, to constitute a breach of warranty. Upon such proof was predicated an estoppel against the insurer. It was held, in effect, that if the insurer receive pay for a policy of insurance, knowing it to be

invalid when issued, he shall be deemed to be estopped from insisting upon its invalidity. The object of this rule is to prevent fraud and to render it impracticable for insurers to attempt the acquisition of premiums upon policies known to be invalid when issued. The principle of those cases cannot be applied here. The act which the contract declares shall vitiate the policy had not been performed when the policy was issued. It was not an existing fact. The policy was, therefore, valid at the time of its issuance, and so remained until the property was conveyed without the consent of the defendant. Certainly, the facts here disclosed fail to suggest a fraud which will estop the defendant from interposing as a defense the warranty against a conveyance of the property. As the defendant is not estopped and the action is brought upon the contract as it was written, it follows that the admission of parol testimony to vary or contradict one of its provisions was error.

The judgment should be reversed and a new trial granted, costs to abide the event.

BRADLEY, J. (dissenting).—The main question is whether there was a breach of the provision of the policy that “if the said property shall be sold or conveyed, or if the interest of the parties therein be changed in any manner, whether by act of the parties or by operation of law . . . this policy shall be null and void until the written consent of the company, at the home office, is obtained,” and, if so, whether such breach is available to the defendant as a defense. When the policy was made and the property by it insured, the title to the property was in the plaintiff, William T. Walton, and afterwards, before the loss, it was conveyed by him, through a third party, to his wife the plaintiff, Eliza D. Walton, who had the title at the time of such loss. The policy was made to both of the plaintiffs, and by it the defendant undertook to make good to the insured, their heirs, executors, and administrators, such loss or damage, not exceeding in amount the sum insured, as should happen by fire to the property during the term of the insurance. This contract was made by the defendant to plaintiffs jointly, apparently for the purpose of indemnifying both of them against loss or damage as to all the property, as

if they had a united interest in it. The inquiry arises, Why was this done so by the defendant? If the company were not advised that the title was wholly in the husband at the time the contract was made, it might be said that the policy was made in that form because it was called for by the application of the plaintiffs. But that question is answered by evidence, on the part of the plaintiffs, to the effect that when the defendant's agent called upon the husband to obtain the insurance, he was advised by him that he then had the title and intended to convey the property to his wife, and wanted the policy so that it would insure the property while he held it and have the like effect after the conveyance to her, and was informed by the agent that it could be done by a policy to both of them. It was then understood that it should be so made for that purpose, and an application was prepared by the agent accordingly. And when the agent delivered the policy, he assured the husband that such was its effect. Upon that subject the jury specially found that there was an understanding between the agent and Mr. Walton, at the time the application was made, that the premises would be transferred by the latter to his wife thereafter, and that the policy was issued to Walton and his wife, on that account, by the defendant. The powers of the agent were somewhat defined by his certificate of appointment, which was that he was constituted agent, "with full power to receive proposals of insurance, . . . to consent to assignments of policies and to attend to the business of said agency, in accordance with the rules and regulations of said company, and to such instructions as may be given by its officers." He was not, therefore, a general agent of the defendant, and had not the power to waive the condition of the policy first above mentioned. *Wilson v. Genesee Mut. Ins. Co.*, 14 N. Y. 418. But the defendant was responsible for the acts of the agent within the scope of his authority, and chargeable with the knowledge he acquired in the exercise of his power, having relation to it, and upon which he acted, and the parties insured relied in their dealing with him. The matter of title to the property, at the time the application and policy were made, was a legitimate fact of inquiry and representation. The policy provides that applications for insurance must be made in writing and signed by the applicant, or by his authority,

and that all its statements will be deemed warranties; and if the interests of the insured be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the insured, it must be so represented to the company in the application, otherwise the policy will be void. And any misrepresentation or concealment will have the like effect. It may be assumed, so far as it is essential to do so, that the defendant was charged with knowledge of any information received by the agent on the occasion of taking the application, in respect to the title to the property insured. *McEwen v. Montgomery, etc., Ins. Co.*, 5 Hill, 101; *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434. The company then, with knowledge that the wife had no title to the property, united her with her husband as a party, insured by the policy, for the purpose of indemnifying her against such loss as she might suffer at the time and in the event it should occur. That interest was dependent upon transfer of the property or some interest in it to her by her husband. There was no apparent reason for making the wife a party to the policy, other than that she might subsequently acquire some interest in the property. It would, therefore, seem that the taking by the wife of the title or some interest in it, from her husband, may be deemed to have been in contemplation between the parties to the contract of insurance when the policy was issued, and that the defendant may be estopped from asserting to the contrary. It cannot well be claimed that the wife was joined with a view to her inchoate right of dower in the real property covered by the policy. It is only the entire, unconditional, and sole ownership that is insured, unless otherwise represented in the application. The title of the property or interest in it, of any party insured, is in no manner qualified in the application or policy. In view of the situation, as above represented, there arises the further question, Was the property sold or conveyed, or the interest therein of the parties insured in any manner changed within the meaning of the provisions of the policy? The title had not passed from those parties at the time of the loss. The conveyance through a third party to the wife had the effect only to take the title beyond them on its way to her, and in practical effect is no different than if it could have and had been made directly from the hus-

band to the wife. *Wolfe v. Security Fire Ins. Co.*, 39 N. Y. 49. If they had held the title jointly when the policy was made, transfers thereafter made between them would seem not to come within the condition of the policy relating to the sale or conveyance of the property insured or to the change of the interest of the parties in it. Such is the weight of authority upon that subject. *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; *Keeney v. Home Ins. Co.*, 71 id. 402; *Dresser v. U. F. Ins. Co.*, 45 Hun, 298; *Burnett v. Eufala Home Ins. Co.*, 46 Ala. 11; 7 Am. R. 581; *Pierce v. Nashua Ins. Co.*, 50 N. H. 297; 9 Am. R. 235; *Dermani v. Home Mut. Ins. Co.*, 26 La. Ann. 69; 21 Am. R. 544; *West v. Citizen's Ins. Co.*, 27 Ohio St. 1; 22 Am. R. 294; *Texas Banking and Ins. Co. v. Cohen*, 47 Tex. 406; 26 Am. R. 298; *Powers v. Guardian Fire Ins. Co.*, 136 Mass. 108; 49 Am. R. 20; *Peck v. New London Mut. Ins. Co.*, 22 Conn. 575; *Lockwood v. Middlesex Mut. As. Co.*, 47 id. 553. And a reason for such construction, as given by Judge Porter in the Hoffman case, and adopted in some of the other cases cited, was that the sales and conveyances which the parties had in view when the condition was made part of the contract, were "evidently such, and such only, as would transfer the proprietary interest of those with whom the insurers contracted to others with whom they had not consented to contract. They testified their confidence in each of the assured by issuing to them the policy, but they did not choose to repose blind confidence in others who might succeed to the ownership. . . . The design of the provision was to interdict all sales of proprietary interests by parties insured to parties not insured." In the present case both plaintiffs were parties to the contract, and both were insured by it. The wife, no less than the husband, was by the terms of the policy insured. The title and entire interest in the property remained in the parties whom the defendant undertook by the contract to indemnify. The reason of the rule of construction applied in the Hoffman case is applicable to this case. The confidence reposed in the plaintiffs must be deemed to have been equal as to each, because the contract was made alike with both of them. Such contracts are of a personal nature, and in making them are involved considerations having relation to the character of the persons insured, as upon their care and

vigilance the reasonable protection of the property against the hazard assumed by the insurer is dependent. Hence it is that such conditions are inserted in policies, so that the insurers may not be subjected to consequences of the habits or motives of interest of those with whom no contract of insurance has been made. The purpose of a provision in a contract may be entitled to some considerations in its construction and application, with a view to the intention of the parties, and that such intention may be carried into effect. *Kelley v. Upton*, 5 Duer, 336; *Parshall v. Eggert*, 54 N. Y. 18; *Colt v. Phoenix Ins. Co.*, id. 595. And as was said in *Hoffman v. Aetna Insurance Company*, 32 N. Y. 413: "Words should not be taken in their broadest import when they are equally appropriate in a sense limited to the object the parties had in view." In such case the language employed will be construed *contra proferentem*, and will be given such import as the promisor had reason to suppose the other party understood it. *McMaster v. Insurance Co.*, 55 N. Y. 222; *White v. Hoyt*, 73 id. 505. It is only when no other construction is permitted that such one as produces a forfeiture or renders a contract void will be adopted. *Hitchcock v. N. W. Ins. Co.*, 26 N. Y. 68; *Dilleber v. Insurance Co.*, 69 id. 256; *Coyne v. Weaver*, 84 id. 386. The promise of the defendant was to make good the loss or damage to the property which the plaintiffs should sustain. This was subject to the condition that the property should not be sold or conveyed, or the interest therein of the plaintiffs changed. The title did not, nor did any interest in it, pass from the parties insured. It was wholly in those parties when the policy was made, and was still there at the time of the loss. In that sense there was no sale or change of interest, and in that sense the language of the condition may be interpreted, and thus the supposed intention of the parties to the contract effectuated. They are, by the terms of the policy, treated as one party to it without any distinction as to interest or as to the beneficial results which might come from the promised indemnity. This leads to a further proposition, that the defendant, chargeable with knowledge of the situation of the title to the property at the time the policy was made, treated the plaintiffs as interested jointly in it; and, if that relation were essential to the right of transfer between themselves without breach of the condition before

mentioned, the defendant is disabled, for the purpose of defense, from denying to them the benefit which such relation would afford. Otherwise, it may be said that the defendant had furnished an opportunity to itself to practice a fraud upon them, which could not have existed if the policy had been made to the husband alone; for in that case, on the sale and conveyance to the wife, she could have taken the consent of the company to the transfer and continued the policy for her benefit, or have obtained insurance elsewhere. *Short v. Home Ins. Co.*, 90 N. Y. 16. The fact that she was made a party to it, under the circumstances which placed her in that relation, rendered the consent, which the agent was authorized to give, of transfer of the policy unnecessary, and she was at liberty to assume that it was effectual for her indemnity.

FOLLETT, Ch. J., POTTER and VANN, JJ., concur with PARKER, J.; HAIGHT and BROWN, JJ., concur with BRADLEY, J., dissenting.

Judgment reversed.

CHAPTER XIV.

CLAUSES OF THE NEW YORK STANDARD FIRE POLICY—CONTINUED.

NEW YORK COURT OF APPEALS, 1890.

SMITH v. AGRICULTURAL INS. CO.

(118 N. Y. 522.)

Warranty against incumbrances.

FOLLETT, CH. J.—This action was defended on the ground, among others, that the following conditions in the policy were violated by the insured :

(1) "If the property, either real or personal, or any part thereof, shall be encumbered by mortgage, judgment or otherwise, it must be so represented to the company in the application, otherwise this entire policy and every part thereof shall be void."

(2) "This policy of insurance is based upon a written application on file in the company's office, purporting to be signed by the applicant, or by his authority, and all statements contained therein are warranties on the part of the assured."

The application on which the policy was issued was signed by the duly authorized agent of the insured, and contains this question and answer :

"Q. How much is the real estate encumbered? A. \$1,000."

When the policy was issued, and when the loss occurred, there were five mortgages on the fifty acres, the principal sums of which aggregated \$4,411.14, with arrears of interest amounting to more than \$600, so that the premises were encumbered for upward of \$5,000; and, in addition, there was mortgage upon six acres, adjoining the fifty acres, of \$500, with interest from July 1, 1887.

Since 1880, Elton M. Smith, the insured, has not resided in

this State, and Elijah Smith, his father, has occupied the property, and acted as the agent of his son in respect to this insurance. Since some time before the date of the policy, Abram Weed has been an agent of the defendant, with powers defined by the following clause in the application: "The powers of the agents of this company are limited to receiving proposals for insurance and collecting premiums, and giving the assent of the company to assignments of policies." The oral negotiations, which resulted in the execution and delivery of the application on which the policy was issued, were conducted by Elijah Smith in behalf of the insured, and Abram Weed in behalf of the defendant. Elijah Smith testified: "*Q.* What was said (between you and Weed) on the subject of incumbrances? *A.* He asked if there was a \$1,000 incumbrance, and I told him there was over \$2,000 incumbrance on it. *Q.* Did you tell him there was \$1,000 incumbrance on it? *A.* No, sir; the application was not read to me, and I did not read it; that representation that there was only \$1,000 incumbrance was not true; I signed it not knowing that that was there."

Abram Weed testified that Elijah Smith stated that the place was encumbered for \$1,000, and that he did not say it was encumbered for over \$2,000.

The court instructed the jury, that, if Elijah Smith stated to Abram Weed that the place was encumbered for \$1,000, the plaintiff could not recover. But if Smith told Weed the place was encumbered for over \$2,000, that the discrepancy between such statement and the amount of the incumbrances was not a defense to the action. To this instruction the defendant excepted, and asked the court to instruct the jury, that, if they found that Smith stated to Weed that the property was encumbered for over \$2,000, the plaintiff could not recover, which was refused, and an exception taken. This question was also raised by a motion to non-suit.

The most favorable view which can be taken by the court for the plaintiff is to consider the case as though the question and answer testified to by Smith had been inserted in the application instead of in the question and answer appearing therein.

Assuming, then, that the conversation between the agents

of the contracting parties about incumbrances was precisely as testified to by the insured's agent, there was a material misrepresentation in respect to the amount of the liens. The answer that the place was incumbranced "for over \$2,000," to the question, "Is there a \$1,000 incumbrance on it?" did not actually or proximately disclose the fact inquired about. The answer, "over \$2,000," cannot by any fair construction be held to be notice to the defendant, or its agent, that the place was then encumbered for over \$5,000.

It is urged by the respondent that this contract of insurance is severable; that the insurance on the barn should be deemed one contract, the insurance on its contents another contract; and that a misstatement in respect to the amount for which the realty was encumbered does not invalidate the insurance on the personalty; and that defendant, having asked the court to rule that no part of the loss could be recovered, asked for too much in the instruction prayed for and in its motion for a non-suit, and that the exceptions to these rulings are unavailable. Under forms of policies quite different from the one in the case at bar, insuring specific amounts on separate items of property, contracts have been held severable. The following cases illustrate the rule: *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; *Herrman v. Adriatic Fire Ins. Co.*, 85 id. 162; *Schuster v. Dutchess Co. Ins. Co.*, 102 id. 260; *Holmes v. Drew*, 16 Hun, 491; *Sunderlin v. Aetna Ins. Co.*, 18 id. 522; *Dacey v. Agricultural Ins. Co.*, 21 id. 83; *Woodward v. Republic Fire Ins. Co.*, 32 id. 365; *Baldwin v. Hartford Fire Ins. Co.*, 60 N. H. 422.

It is expressly stipulated in this policy, that if either the real or personal property, or any part of it, be encumbered, it must be so represented to the company in the application; otherwise the entire policy and every part of it shall be void.

This policy is quite different in its legal effect from those considered in the cases cited; it not being expressly provided in those policies, as in this, that a misrepresentation of the situation of one of the subjects insured should invalidate the insurance on all other property covered by the policy.

Regarding the application amended so as to conform to the testimony produced by the plaintiff, and then construing the application and policy together as the parties have stipulated

that we must, there was a breach by the insured of the terms of the contract of insurance, which defeats the plaintiff's claim to recover.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur, except BROWN, J., dissenting; and BRADLEY and HAIGHT, JJ., not sitting.

Judgment reversed.

CHAPTER XV.

CLAUSES OF THE NEW YORK STANDARD FIRE POLICY—CONTINUED.

KINGSTON SURREY SPRING ASSIZES, 1870.

CHAPMAN v. POLE.

(22 L. T. N. S. 306.)

Fraud and overvaluation.

ACTION against the Sun Insurance Company, on a fire policy. Plea, "that there appeared to be, and was, fraud in the claim made by the plaintiff upon the company, for and in respect of the said alleged loss and damage, etc., on account of the said loss or damage delivered to the company's office."

The policy was effected in February, 1866. The fire occurred in the following September, and the claim was made forthwith for £418 as for a total loss, but no particulars were delivered until required under the conditions. The particulars of the claim when delivered appearing—on comparison with the salvage and *débris*—grossly exaggerated, payment was refused. In November this action was brought, and in February, 1867, interrogatories were delivered to the plaintiff, which, not being answered, the action was stayed until, in January, 1870, they were answered, and the action proceeded.

After the plaintiff made a claim of damage to the amount of £418, further particulars being required, in October particulars of claim were delivered, claiming large sums for specific articles to each room. The plaintiff also made a statutory declaration in the usual form, "that the said estimate or account contains, to the best of my knowledge and belief, a true and faithful account of the loss and damage sustained by me in my said goods and chattels, all of which were my own property, and were in and upon the said house when the fire happened,

and were burned, lost, or damaged by the fire; and that my real and just loss on the said goods and chattels occasioned by the fire amounts to £418; and I make this solemn declaration conscientiously believing the same to be true." It had appeared, however, on the report of the inspector as to salvage and *débris*, that it was impossible there could have been the quantity and value of the goods represented; and in one of the rooms remaining unconsumed, the contents, valued at £30, were not worth £3; and in the bed-rooms the remains of cheap iron bedsteads, worth a few shillings, were found in the place of mahogany stated as worth £15; while the *débris* of crockery, etc., found would only represent a few shillings' worth, instead of £33, the value stated; and other heads of claim were found in the same proportion to exceed the real value.

The company, however, having disputed the claim, and having in this action interrogated the plaintiff as to the mode in which he had acquired the goods insured, he stated in his answer that he had purchased the greater part of them at sales, and had them many years before the policy, though some of them were given to him, and some by one Bennett, an attorney, now dead. Being cross-examined as a witness, he stated that he had purchased them nearly all from Bennett, and had given him between £300 and £400 for them. He also stated that in July he had assigned the goods to one Walker for advances to the amount of £400. The plaintiff was called, with Walker, in support of his claim, but could give no particulars or vouchers. Strong evidence, however, was given on the part of the company to show that the furniture was of the poorest description—not worth above £50; that a great part had been removed in June, so that at the time of the fire the things in the house were not worth more than £30.

COCKBURN, C. J., to the jury.—In consequence of the observations which have been made upon the conduct of the Insurance Company, I feel it to be my duty to say that I consider, that, in insisting on a full and searching examination into the case in a court of justice, the defendants, the Sun Fire Insurance Society, have only discharged their duty to their shareholders and the public. Beyond all doubt, this is a case deserving of such an examination and inquiry; for, whatever

may be its result, from beginning to end the case presents itself under circumstances of grave suspicion, and calling for searching inquiry. The issue for you to determine in substance upon this case is whether the plaintiff has made an honest or dishonest claim : the issue is fraud or no fraud. If the defendants have failed to satisfy you that the claim was fraudulent, the plaintiff is entitled to recover ; and, in that case, the only question will be, what was the real value of the goods destroyed ? for that is all he is entitled, in any event, to recover. But if you think the defense is made out, and that, in point of fact, with reference either to the quantity or value of the goods, the plaintiff knowingly preferred a claim he knew to be false and unjust, then he is entitled to recover nothing. That is one of the conditions in the policy, and the company are entitled to stand upon the defense. And considering how exposed they are to deception, and how rarely they are able to establish it by proof, in my opinion when they have a case in which they are honestly convinced that fraud has been perpetrated, and that they have sufficient evidence of it to submit to a jury to establish it, then they are not only fairly entitled, but they are bound to do so. For you will do well to bear in mind that the rate of insurance is calculated upon the average of losses as compared with profits, and the more the company is subjected to deception and fraud, the higher the rate of premium which they are obliged to charge. Therefore, the public have an interest in such cases, and the company is bound to defend them, when they have fair ground for so doing, as they certainly have in this instance. We must start in such a case with certain principles. It is not, certainly, a question of mere accuracy or inaccuracy. A man may make a mistake in his claim, and it may be quite honestly. If, for instance, a man either fails to recollect the precise quantity of goods he has on his premises at the time of the fire, or mistakes the value of those of which he was in possession, and thus he presses a claim according to what he believes honestly to be true, but which may in the end turn out to be mistaken, the only consequence which ensues is, that, inasmuch as the contract of insurance is simply a contract of indemnity, he can only recover to the extent of the real value of the goods he has actually lost. You must not run away with the notion that a policy

of insurance entitles a man to recover according to the amount represented as insured by the premiums paid. It is essentially a contract of indemnity. If a man chooses to insure goods worth £100 at a rate of premium which represents a value of £500, he can only recover the real and actual value of the goods. The law will not allow of gambling in the form of insurance. Insurance companies are subject to fraud enough as it is, and, if persons were allowed to insure goods to a greater amount than the real value, it is obvious that a door would be open to fraud and wickedness of the most abominable description. Therefore, in all the cases the only question—supposing the claim to be honest—is, what was the real and actual value of the goods destroyed. But beyond that, although the insured has not caused the fire, yet if he has made a fraudulent claim, then, on such a condition as is contained in this policy, he must fall by the fraud he has thus attempted to perpetrate, and is not entitled to recover at all. Such being the legal principles on which the question to be determined arises, it is for you to determine upon the evidence. If you believe the evidence for the defense, it is clearly established, and it is a gross and scandalous case of fraud. According to that evidence the claim was grossly excessive not only in point of value, but as to the quantity and character of the furniture insured; and it is not easy to conceive of such gross exaggeration being honest. A man may be somewhat mistaken as to the exact value or the precise number of the articles of furniture he possesses, but he can scarcely be so grossly ignorant of the furniture of the rooms in which he lives and sleeps as honestly to represent articles worth a few shillings or pounds as worth large sums of money. If, then, you believe the evidence for the defense, it is your duty to find for the defendant, as in that view a more scandalous fraud never was attempted.

Verdict for the defendant.

SUPREME COURT OF IOWA, 1884.

BEHRENS V. GERMANIA FIRE INS. CO.

(64 Iowa, 19.)

Overvaluation to avoid the policy must be intentional.

Action on a policy of insurance in the usual form, to recover damages sustained by the destruction by fire of the property insured. The defendant pleaded that the plaintiff falsely and fraudulently overvalued the property insured. There was a trial by jury, verdict, and judgment for plaintiff, and defendant appealed.

SEEVERS, J.—I. The court instructed the jury as follows: "As to the defense stated in the third instruction, you are informed, that, if you find that the preponderance of credible evidence establishes that plaintiff, in getting the policy in suit, made a false statement as to stock purchased and added to that already possessed, or intentionally deceived the agent Deggin-dorf as to the value of his property, and thereby obtained the policy in suit, the defendant is entitled to a verdict. But a mere honest mistake as to value is not sufficient to invalidate the policy, and thereby defeat plaintiff's action." No exception is taken to this instruction, and it therefore must be regarded as the law of the case. The jury found specially that the plaintiff represented the value of the property at the time he obtained the insurance to be two thousand dollars, and that its actual cash value at that time was only twelve hundred and forty dollars, and that the plaintiff at the time of procuring the policy "did not knowingly, and with intent to deceive, misrepresent the value of the property" insured.

It is insisted that this finding is contrary to the evidence. We do not think this is so. We have read the evidence carefully, and are unable to reach the conclusion that the plaintiff purposely and with intent to deceive made a false statement of the value of the property. The policy contains this provision: The "amount of such loss or damage is to be estimated according to the actual cash value at the time of the loss." Under the terms of the policy, the plaintiff could not possibly gain anything by the overvaluation. The evidence, therefore,

of a fraudulent intent should at least be of a satisfying character to warrant us in disturbing the verdict. We cannot say that the evidence fails to sustain the special finding.

II. Substantially, it is insisted that the overvaluation is so great, that, conceding that there was no fraudulent intent, there cannot be a recovery. But, as we have seen, the defendant's liability is not to be measured by the valuation at the time the insurance was effected, but by the actual cash value of the property at the time it was destroyed. Overvaluation by owners of property is a usual occurrence, and made honestly; that is, the owner will place a higher value on his property than his neighbor, and we doubt not this is well understood by insurance companies, and we doubt whether anything short of a fraudulent intent should avoid a policy of the character in question. But, be this as it may, the overvaluation in this case is not so great as to justify us in holding, as a matter of law, that there cannot be a recovery on the policy in question. The decided weight of authority, we think, is in accord with this view. *Bonham v. Iowa Central Ins. Co.*, 25 Iowa, 328; *Franklin Ins. Co. v. Vaughan*, 92 U. S. 516; *Williams v. Phœnix Fire Ins. Co.*, 61 Me. 67; Wood on Insurance, § 426; *Dogge v. North-western Ins. Co.*, 49 Wis. 501.

Affirmed.

NEW YORK COURT OF APPEALS, 1878.

WALSH v. HARTFORD FIRE INS. CO.

(73 N. Y. 5.)

A stipulation or notice in the policy limiting the agent's authority to waive except in a designated manner is, if truthful, binding upon the insured.

ANDREWS, J.—The policy contains the following conditions and provisions: "If the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain for more than fifteen days without notice to the company and consent indorsed hereon, then the policy shall be void. And it is further expressly covenanted by the parties hereto, that no officer, agent, or representative of this company shall be held to have waived any of the terms and conditions of the policy, unless such waiver shall be indorsed hereon in

writing. This policy is made and accepted upon the above express conditions."

The dwelling insured when the policy was issued was occupied by a tenant who left the premises June 3, 1875, and the house remained vacant from that time until the time of the fire, July 23, 1875. There was no consent to the vacancy indorsed on the policy, and *prima facie* the plaintiff was not entitled to recover. The vacancy for more than fifteen days before the fire having been shown, it was incumbent upon the plaintiff, in order to maintain his action, to establish that the company had waived or dispensed with the condition, or in some way precluded itself from taking advantage of it. It appeared upon the trial that one Carpenter was the agent of the defendant at Carthage, and was authorized to solicit risks, receive applications for insurance, fix rates of premium, and issue and renew policies on behalf of the defendant. The policy in question was issued by Carpenter. The plaintiff's son, who acted for him, met Carpenter on the day the dwelling was vacated, and informed him that the tenant was moving out, and asked him to consent that the dwelling should remain vacant, and Carpenter replied that he would give his consent. The next morning, as the son testified, he went to Carpenter's office to see if he had given consent, and asked him if it was necessary to get the policy and have the consent indorsed, and Carpenter replied, "It was not necessary; it was indorsed on the books, and it was all right." Carpenter was called as a witness for the plaintiff, and testified: "I think Mr. Walsh, either in the office or on the steps, spoke to me and asked me if it was not necessary to indorse that (consent) on the policy. I told him I did not think it was, but I couldn't do it." Carpenter kept a register in which he entered a memorandum of the policies issued at his agency, and in the margin of the register, opposite the memorandum of the policy in question, was entered, in his handwriting, the words, "Permission to be vacated between time of tenant moving out and another coming in." When this entry was made is left uncertain. Carpenter, when pressed to state the time, said, "I guess it was before the fire," and he was unable to fix the time more definitely.

The plaintiff on the trial insisted that the evidence and

facts above recited established a waiver by the defendant of the condition requiring that consent to a vacancy should be indorsed on the policy. In determining this question it is important to bear in mind that there is no proof tending to show a waiver by the company of the condition, independently of the acts of the agent Carpenter. The transaction between the agent and the insured was not known to the company until after the fire. The agent made no report of the fact that the consent had been applied for or had been given. In short, there was no recognition, affirmance, or ratification by the company of what was said or done by the agent upon the application of the plaintiff for consent that the premises might remain vacant. The question, therefore, whether there was a valid consent that the dwelling might remain unoccupied, depends upon the authority of the agent to give such consent in any other mode than by indorsement upon the policy; or, in other words, whether having power to consent by indorsement on the policy, he could nevertheless bind the company by an oral consent, or by such consent accompanied with a memorandum thereof made in his register. That the agent was authorized to consent to the vacancy by a written indorsement on the policy is clearly implied from the language of the condition; and if the mode in which his consent should be manifested had not been specified, or if no provision upon the subject had been contained in the policy, we do not doubt that Carpenter could have consented either orally or in writing, and that his consent in either mode would have bound the company. He was the general agent of the company in the locality where he resided to make contracts of insurance in its behalf, and was vested with large discretionary powers. The power of such an agent must, in the absence of special restrictions, be deemed to include the power to modify contracts made by him, dispense with conditions, and do such acts from time to time as are necessary to prevent a forfeiture of policies as a consequence of changes in the ownership, situation, or occupation of the insured property.

Insurance corporations organized under the laws of one State may, and often do, carry on their business in other States. They cannot conduct their business except through agents, and it is a reasonable and just inference that agents

intrusted with the power to make original contracts of insurance have also the power to modify them as occasions and circumstances require. Nor would a restriction upon the power of an agent, not known to persons dealing with him, limiting the usual powers possessed by agents of the same character, exempt the principal from responsibility for his acts and contracts, which were within the ordinary scope of the business intrusted to him, although he acted in violation of special instructions.

The company could itself dispense with this condition by oral consent, as well as by writing, *Trustees, etc. v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; and Carpenter, unless specially restricted, would have possessed, in this respect, the power of the principal. But the policy contains the provision that no agent of the company shall be deemed to have waived any of the terms and conditions of the policy, unless such waiver is indorsed on the policy in writing. This is a plain limitation upon the power of agents, and can mean nothing less than that agents shall not have the power to waive conditions, except in one mode, viz., by an indorsement on the policy. The plaintiff is presumed to have known what the contract contained, and the proof tends to the conclusion that this provision was brought to his notice. He saw fit, however, to accept the assurance of the agent that an entry in the register was sufficient. It is difficult to see how, upon the law of contracts and agency, the plaintiff can recover. The entry in the register was not an indorsement on the policy. The oral consent was an act in excess of the known authority of the agent. The provision was designed to protect the company against collusion and fraud, and the dangers and uncertainty of oral testimony. The case seems to be a hard one for the plaintiff; but courts cannot make contracts for parties, nor can they dispense with their provisions.

The authority of an agent is not only that conferred upon him by his commission, but also as to third persons that which he is held out as possessing. The principal is often bound by the act of his agent in excess or abuse of his actual authority, but this is only true between the principal and third persons, who, believing and having a right to believe that the agent was acting within and not exceeding his authority, would sustain

loss if the act was not considered that of the principal. *Clark v. Metropolitan Bank*, 3 Duer, 248; Story on Agency, § 127; *Howard v. Braithwaite*, 1 Ves. & B. 209; *Stainer v. Tysen*, 3 Hill, 279; *Barnard v. Wheeler*, 24 Me. 279. The doctrine is established to prevent fraud, and proceeds also upon the ground that when one of two innocent persons must suffer from the act of a third person, he shall sustain the loss who has enabled the third person to do the injury. If, however, a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is in excess of or an abuse of the authority actually conferred, then manifestly the principal is not bound, and it is immaterial whether the agent is a general or special one. The principal has the unqualified right, as between himself and the agent, to define and limit the agent's authority; to invest him with large or with restricted powers only. The agent, as we have seen, may sometimes bind the principal, although he transgresses his instructions, provided his apparent authority extends to the act done, but this is a rule of protection only.

Applying to this case these familiar principles, there can be little doubt how the question presented in this case should be decided. There was a breach of condition which, by the express terms of the contract, rendered the policy void. The condition was a lawful one, and one which the company had the right to insert in the contract. The judge at the trial held the proof to be insufficient to establish a waiver of the condition, and non-suited the plaintiff. The General Term reversed the judgment on the non-suit, and ordered a new trial.

We think this action cannot be sustained. This conclusion does not interfere with that class of cases which have established that conditions for the prepayment of premium and the like, which enter into the validity of a contract of insurance at its inception, may be waived by agents, and are waived if so intended, although they remain in the policy when delivered, and that a contract for renewal is for this purpose to be treated as an original contract. *Trustees, etc. v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Sheldon v. Atlantic Fire and Marine Ins. Co.*, 26 id. 460; *Boehen v. Williamsburgh Ins. Co.*, 35 id. 131; *Bodine v. The Exchange Ins. Co.*, 51 id. 117; *Bowman v. Agricultural Ins. Co.*, 59 id. 526; *Carroll v. Charter Oak*

Ins. Co., 1 Abb. Ct. App., Dec. 316; *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 434. We think a recovery cannot be permitted in this case without changing the law of contracts.

The order granting a new trial should be reversed, and judgment entered upon the non-suit affirmed.

ALLEN, RAPALLO, and EARL, JJ., concur; CHURCH, Ch. J., FOLGER and MILLER, JJ., dissent.

Order reversed and judgment affirmed.

CHAPTER XVI.

CLAUSES OF THE LIFE POLICY.

NEW YORK COURT OF APPEALS, 1877.

CUSHMAN v. UNITED STATES LIFE INS. CO.

(70 N. Y. 72.)

Warranty : Meaning of terms "disease" and "usual medical attendant."

ACTION upon a policy of life insurance issued by defendant upon the life of Birt Cushman, plaintiff's intestate. The defense was a breach of warranty. The case upon a former appeal is reported in 63 N. Y. 404.

At the close of the evidence defendant's counsel moved for a non-suit, on the ground that the evidence showed a breach of warranty in answers by the insured to the following questions in the application: "Has the party had . . . disease of the liver?" Answer, "No." "Or any serious disease?" Answer, "No." "Give name and residence of party's usual medical attendant." Answer, "Charles Purdy, M.D., Norwich." The motion was denied, and said counsel duly excepted.

EARL, J.—It is claimed that there was a breach of warranty in answering "No" to the question in the application whether the applicant "had ever had disease of the liver." Dr. Ormsby, a young physician, who was admitted to practice in 1868, attended the insured in July, 1870, for four, five, or six days, and he testified that he, in his judgment, had congestion of the liver. It does not appear that his symptoms were very marked. He was not much sick, was dressed every day, and up and around more or less, and soon recovered. He again attended him in July, 1871, for a similar sickness, still less serious, visited him two or three times, and treated him for congestion of the liver. In 1872, after the policy was issued,

he treated him again, for five days, for the same complaint; and in 1873 he again attended him for a few days in his last illness, and testified that he then had, and died of, acute congestion of the liver. The evidence tended to show that the assured was not much sick at any of the times when Dr. Ormsby visited him prior to his last sickness; that he was not confined to his bed; that he was up and around; that he speedily recovered; and that, during all the years prior to his last sickness, he was capable of vigorous labor and great endurance, and was apparently a sound, healthy man. In November, 1871, Dr. Purdy, defendant's examining physician, who had known the assured for many years, examined him upon his application for insurance, and found his liver sound and free from disease. He was called to attend him in consultation with Dr. Ormsby, in his last sickness, shortly before his death, and testified that, from the symptoms detailed to him by Dr. Ormsby, he did not die of congestion of the liver, but of inflammation of the bowels, thus contradicting Dr. Ormsby as to the cause of death. Taking into consideration all the evidence, it cannot be said that it was so conclusively shown that the assured had had congestion of the liver prior to the date of the policy as to leave nothing for the determination of the jury. Taking into consideration the symptoms of the sickness, the degree of skill and the extent of the examination of the doctor, the very slight nature of the sickness and the speedy and complete recovery, and all the other circumstances, it was for the jury to determine whether, prior to the insurance, the assured had had congestion of the liver. But, even if he had had such congestion, it does not follow that, within the meaning of the policy, he had had a disease of the liver. In construing contracts words must have the sense in which the parties used them; and, to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circumstances must be considered. By the questions inserted in the application the defendant was seeking for information bearing upon the risk which it was to take, the probable duration of the life to be insured. It was not seeking for information as to merely temporary disorders or functional disturbances having no bearing upon general health or continuance of life. Colds are generally accompanied with more or less

congestion of the lungs, and yet in such a case there is no disease of the lungs which an applicant for insurance would be bound to state. So most, if not all, persons will have at times congestion of the liver, causing slight functional derangement and temporary illness; and yet, in the contemplation of parties entering into contracts of life insurance, and having regard to general health and the continuance of life, it may safely be said that in such cases there is no disease of the liver. In construing a policy of life insurance it must be generally true that, before any temporary ailment can be called a disease, it must be such as to indicate a vice in the constitution, or be so serious as to have some bearing upon general health and the continuance of life, or such as, according to common understanding, would be called a disease; and such has been the opinion of text writers and judges. 2 Park. on Ins. 933, 935; *Chattock v. Shawe*, 1 Moody & R. 498; *Fowkes v. The M. & L. Life Ins. Co.*, 3 Foster and Fin. 440; *Bartear v. The Phoenix Mut. Life Ins. Co.*, 3 T. & C. (N. Y. Sup. Ct. R.) 578; *Peacock v. New York Life Ins. Co.*, 20 N. Y. 293; *Higbie v. Guardian Mut. Life Ins. Co.*, 53 N. Y. 603; *Fitch v. Am. Pop. Life Ins. Co.*, 59 N. Y. 557, 571. Hence, whether the assured had had congestion of the liver, and whether such congestion was of such a character as to constitute a disease of the liver within the meaning of the policy, were both questions properly submitted to the jury, and their determination thereon is conclusive.

The assured also answered "No" to the question in the application whether he "had had any serious disease." It can hardly be claimed that there was any evidence showing this answer to have been untrue. But whether it was true or not, for reasons above stated, it was at least a question of fact upon all the evidence for the jury.

To the question as to the "name and residence of the party's usual medical attendant," the assured answered, "Dr. Charles Purdy," and it is claimed that his answer was untrue. In 1867 Dr. Greenleaf attended the assured when he was sick with some trouble of the bowels, from the 14th to the 30th day of August, and he never attended him before or after that time. Dr. Ormsby attended him prior to the date of the policy only in July, 1870, and July, 1871, as above stated. The assured was a single man, who had always prior to his insurance

lived in his father's family, and Dr. Purdy had for many years been the family physician. He had frequently attended different members of the family, but had never been called to the house to attend the assured except in his last sickness; but during many years the assured had called upon him every year, and sometimes several times a year, and consulted him as physician. It is quite evident that he knew more about the health and constitution of the assured than any other doctor. To constitute a medical attendance, it is not requisite that a physician should attend the patient at his home; an attendance at his own office is sufficient. Of these three physicians, then, who was the "usual medical attendant"? It certainly was not Dr. Greenleaf, who had attended him during but one brief illness, and never before or after. Was it Dr. Ormsby, who had attended him on two occasions, visiting him in all probably not over half a dozen times? Or was it Dr. Purdy, the family physician in his father's family, upon whom he called yearly for many years for medical advice or treatment? I think Dr. Purdy could more properly be called the usual medical attendant; but, whether this be so or not, it was at least a question for the jury, and there was no error in submitting it to them.

But the policy contained a clause in which the defendant promised to pay the amount insured "in three months after due notice and satisfactory proof of the death during the continuance of this policy of the . . . assured . . . and proof of the just claim of the assured." After the death of the assured, the plaintiff delivered to the defendant claim and proof of loss, signed and verified by himself. Annexed thereto was the statement of Dr. Ormsby, as physician in attendance upon the assured in his last illness, as to the cause of his death; and in that statement, in answer to the question, "How long have you been the attendant or family physician?" he answered, "Five years." It is contended that this answer shows that Dr. Purdy was not "the usual medical attendant" of the assured prior to the date of the policy, and hence that there was a breach of warranty rendering the policy void, and that therefore there was no "proof of just claim" as required by the policy. To this contention there are several satisfactory answers. The answer made in August, 1873, that Dr. Ormsby had been the "attending physician" of the assured for five years, does not

necessarily show that the answer made at the time of the insurance in November, 1871, that Dr. Purdy had, prior to that time, been the "usual medical attendant," was absolutely untrue. A party may have several "attending physicians" and one "usual medical attendant." But a still better answer is, that the plaintiff was not wholly responsible for the statements made by Dr. Ormsby. He had made his statement, showing a "just claim" against the defendant for the amount insured, and in that statement there was nothing in conflict with any warranty contained in the policy. This statement, we may infer from the form of blank furnished by the company, the plaintiff was required to procure from the physician who attended the assured in his last illness. The main object of this statement was to furnish the company evidence of the death, and the cause and circumstances thereof. There can be no reason for holding the plaintiff responsible for any misstatement contained therein not caused by him. He was responsible for the statement made by himself, but not for the statements which he was required to procure from the attending physician, the officiating clergyman, and the undertaker. Such statements were procured at the request of the defendant for its information, and it must take them for what they may be worth. The plaintiff had no means of compelling answers in such statements to suit himself. If the answers were not satisfactory, or were in conflict with any answers contained in the application for the insurance, the defendant could have instituted further inquiries, or asked for further explanations from the plaintiff. This it did not do. So far as it appears, it made no objection to the proof of loss, and did not in answer, or at any prior time, allege the discrepancy now noticed as a reason for refusing to pay the amount insured. It cannot claim to have been misled by the statement of Dr. Ormsby into a defense of the action, even if that were material, as this defense was not alluded to in the answer, and other special defenses were, and were also litigated upon the trial, and there was no evidence that it was so misled. There was, therefore, nothing to prevent the plaintiff from proving upon the trial the truth as to who was the usual medical attendant of the assured. *Life Ins. Co. v. Francisco*, 17 Wall. 672.

Judgment affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1891.

COBB V. COVENANT MUT. BEN. ASSO.

(153 Mass. 176.)

Warranty as to medical treatment and consulting a physician.

DEVENS, J.—By the terms of his application, which is referred to and made a part of the benefit certificate issued to the insured, he warranted the answers to the questions propounded “to be full, complete, and true,” and agreed that the answers and application should form the exclusive and only basis of the contract between himself and the defendant, and further agreed that, if “any misrepresentations or fraudulent or untrue answers” had been made, the contract should be null and void. The case at bar differs obviously from those in which an applicant has averred that the answers made by him are true according to his best knowledge and belief, or has limited his statement by other similar words. Such answers, if accepted by the insurer, would render it necessary for them to prove that, as thus limited, they were untrue. *Clapp v. Association*, 146 Mass. 529.

The sixth question in Form A of the application was: “Have you personally consulted a physician, been prescribed for, or professionally treated within the past ten years?” To this question the insured answered, “No;” and it has been found by the jury, upon an issue submitted to them, that this answer was false. The plaintiff contended that such an issue should only be found against him in case the answer was intentionally false. In our view, the insured having made the truth of his statements the basis of his contract, it was sufficient for the defendant to show that this statement was actually untrue. The plaintiff further claimed that the question referred to in the application should be construed as referring to a specific disease, and that, if the insured had consulted or been prescribed for by a physician for a pain that did not amount to a disease, his answer to this question would not prevent the plaintiff from recovering. The presiding judge declined to instruct in accordance with this contention, and instructed the jury that if Cobb, the insured, being, as he supposed, in need of a physician, went to one for the purpose of consulting him

as to what the matter was with him, had an interview, answering such inquiries as the physician deemed pertinent, receiving aid, advice, or assistance from him, Cobb "consulted" a physician within the meaning of the interrogatory; and, further, that if they found that he went to a physician for the purpose of procuring aid and assistance from the physician as such, and the physician prescribed a remedy, or treated him professionally either by giving him a prescription or by administering hypodermic injections of morphine, of which there was some evidence, then he was professionally "treated" within the meaning of the interrogatory, or professionally "prescribed for." This ruling appears to us correct. While the question whether Cobb had a fixed disease, and what the disease was, might be an inquiry involved in considerable embarrassment, the question whether he had consulted a physician, or had been professionally treated by one, was simple, and one about which there could be no misunderstanding. Had it been replied to in the affirmative, the answer would have led to other inquiries. Indeed, the question which follows is, "If so, give dates, and for what disease." It is upon the existence of this latter question that the plaintiff founds an argument that it was necessary to show that Cobb had some distinct disease permanently affecting his general health before it could be said that he answered this question untruthfully. But the scope of the question cannot be thus narrowed. Even if Cobb had only visited a physician from time to time for temporary disturbances proceeding from accidental causes, the defendant had a right to know this, in order that it might make such further investigation as it deemed necessary. By answering the question in the negative, the applicant induced the defendant to refrain from doing this. In *Insurance Co. v. McTague* (49 N. J. Law, 587), it was held that where the applicant stated that he had not consulted a physician, or been prescribed for by one, and such statement was shown to have been false by proof of a prescription received, there could be no recovery, although it appeared to have been given for a cold. The court says: "The representation did not aver a condition of health, or that it was requisite or proper to consult a physician. It averred that he had not consulted a physician, or been prescribed for by a physician. The fact found contradicted this averment, whether

the consultation and prescription related to a real disease or an apprehended disease." After retiring, the jury returned into court with a request that the court would define the word "prescription." There was evidence in the case from three physicians tending to show that, on more than one occasion, they had consulted with him, administered hypodermic injections for the pain which he was suffering, and also given him medicine. The presiding judge instructed the jury fully as to the meaning of a "prescription," and added that, if the insured went to one of those physicians and received from him a medicine as a physician, for the purpose of assistance and relief in a difficulty under which he was then suffering, then it is a "prescription" within the meaning of the law. The judge added: "And it is your duty as jurors so to find, whether the consequences may be as you would wish them, or otherwise." The plaintiff excepting to the last paragraph as a charge upon the facts, the presiding judge modified this, and said: "I will endeavor in this way to define a 'prescription,' and let this definition stand for the definition objected to: If the insured went to a physician for the purpose of getting his aid, advice, or assistance as a physician in a difficulty under which he was then suffering, or supposed himself to be suffering, and the physician, hearing what the insured had to say, as a physician, and, for the purpose of relief, or cure, or aid, or assistance, gave to the insured medicine, then it may be said that such a physician prescribed for him." To this the plaintiff also objected as a charge upon the facts, and claimed that the jury should have been instructed that the word "prescription" was a word in common use, which they could clearly define as well as the court. This latter instruction leaves clearly to the jury the inquiry whether the insured had gone to the physician and received from him aid, assistance, medicine, etc., in answer to his application. We cannot see that it has any element of a charge upon the facts. The definition of a "prescription" was entirely correct, nor, even if a word in common use was explained, was there reason why the judge should not define it in answer to the request, if he gave them an accurate definition.

The plaintiff also insists that the last clause of the definition as first given was a charge upon the facts. It is perhaps sufficient to say that it was clearly withdrawn, and the later defi-

nition given in the place of it. We do not, however, consider the last clause of the first definition as a "charge" upon the facts within the meaning of Pub. Stat., c. 153, § 5. The judge had defined the word as to the meaning of which they had inquired, and submitted to them in a condensed way the evidence bearing upon the issue which they were to determine. Certain facts, if they find them to exist, he informs the jury, will make a "prescription" by a physician, within the meaning of the law. He then adds: "And it will be your duty as jurors so to find, and it is your duty so to find, whether the consequences may be as you would wish them to be, or otherwise." Although the last clause is a caution to the jury to disregard the consequences which may follow their decision, there is no reason why a judge, when he deems it proper to do so in the trial, may not caution the jury not to be swayed by sympathy, prejudice, or passion, and direct them to be governed in their finding by the facts as they exist, without regard to the results that may follow therefrom.

Bill dismissed.

CHAPTER XVII.

CLAUSES OF THE LIFE POLICY—CONCLUDED.

IOWA SUPREME COURT, 1880.

CRITCHETT v. THE AMERICAN INS. CO.

(53 Iowa, 404.)

The ordinary canvassing agent has no authority to extend the time for payment of premiums contrary to the terms of the policy, but if employed to deliver the policy he has thereby an implied authority to determine how the premium due at the time of such delivery shall be paid.

ACTION upon a policy of insurance. The defendant alleges that the plaintiff was in default at the time of the loss by reason of the non-payment of an installment of the premium. For a portion of the premium the company had taken the plaintiff's note, whereby he had obligated himself to pay the company three dollars upon the first day of November, 1876, and the same amount upon the first day of November in each of the three succeeding years. The policy contained a provision in these words: "If default shall be made by the assured in the payment of any installment of premium upon the installment note given for this policy for the space of thirty days after such installment shall become due, by the terms of such note, then this policy shall be null and void, and this company shall not be liable to pay any loss happening during the continuance of such default in payment of such installment; but on payment by the assured or his assigns of all installments of premium due under this policy, or upon the installment note given therefor, the liability of the company under the policy shall attach, and this policy be in force as to all the losses happening after such payment, unless it shall be inoperative from some other cause."

The installment falling due Nov. 1, 1876, was not paid.

The loss occurred March 9, 1877. There was a trial by jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

ADAMS, CH. J.—The plaintiff claims that he was not in default at the time the loss occurred, notwithstanding the non-payment of the installment, which, by the terms of his note, fell due on the first day of November, 1876. He claims that the company had extended the time of payment. As evidence of such extension, he testified that one Kennedy, the agent of the company at Oskaloosa, near where he resided, agreed with him after the installment became due to extend the time of payment until he (plaintiff) should receive a certain pension; that he received his pension March 8, 1877, and on the same day went to Kennedy's office to pay the installment due upon his insurance note, but did not find him, and on the next day, about four o'clock in the afternoon, the property insured was destroyed by fire.

The defendant denies that any agreement for extension was made between the plaintiff and Kennedy, and introduced Kennedy as a witness, who testified that none was made. Upon this point the jury found against the defendant, and, the evidence being conflicting, their finding must be taken as conclusive. But the defendant insists that, conceding that Kennedy agreed to an extension, the defendant would not be bound by it, because Kennedy had no authority to bind the company in that respect; and further, if he had, that the plaintiff cannot recover, because the loss occurred after the time as extended, and the plaintiff had not paid even then.

Kennedy's authority was shown by the certificate of his appointment introduced in evidence. From it, it appears that he was authorized to receive applications for insurance, and collect and transmit premiums. Kennedy testified that he was not authorized to issue policies, and it is not pretended that he was.

The court instructed the jury, in substance, that the plaintiff would be entitled to recover if they found that Kennedy agreed to extend the time of payment, and that the loss occurred within such time. The giving of this instruction is assigned as error.

According to the terms of the policy, the company ceased to carry the risk at the end of thirty days from the time the installment became due. If the company continued to carry it, it was by reason of a contract not contained in the policy, and that contract must have been the alleged contract with Kennedy. Now, what precisely was that contract, taking the plaintiff's statement as to what it was? He says: "He (Kennedy) agreed he would give me time to get my pension." From this it will be seen that Kennedy did not undertake to contract that the company would, without payment, continue to carry the risk after it had ceased by the terms of the policy. It is doubtful, indeed, whether he even meant to bind the company not to enforce payment of the installment before plaintiff could get his pension. The words do not necessarily mean more than that he would not himself enforce it.

But we are of the opinion, that, if Kennedy had expressly contracted that the company should carry the risk without payment after it had ceased by the terms of the policy, such contract would not have bound the company. There is no pretense that Kennedy had any express authority to bind the company by any contract whatever. He belonged to an extensive and well-recognized class of insurance agents, from whom the power to make contracts is withheld. If he had the power to contract in the name of the company to carry the risk without payment after it had ceased by the terms of the policy, it is because the law would imply such power from the fact that he was authorized to collect and transmit premiums. But an agent employed to collect a claim does not thereby have authority to bind his principal even to grant an extension of time. *Hutchings v. Munger*, 41 N. Y. 155; *Kirk v. Hiatt*, 2 Carter (Ind.), 323; *Corning v. Strong*, 1 Carter (Ind.), 329. Still less would such agent have authority to bind his principal by a contract of insurance. We have seen no case where the doctrine contended for by plaintiff has been held. We do not say that where a policy is delivered by an agent without the prepayment of the premium it will not take effect, even though the agent have no authority to pass upon and accept the risk, and even though the policy provides that it shall not take effect unless the premium is prepaid. Where an agent is intrusted with a policy for the purpose of deliver-

ing it, and does deliver it, though in violation of a provision of the policy as to prepayment, it has been held that the assured has a right to assume that prepayment has been waived. *Yoring v. Hartford Fire Ins. Co.*, 45 Iowa, 377; *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 521; *Mississippi Valley Ins. Co. v. Neyland*, 9 Bush. 430; *Sheldon v. Conn. Mut. Ins. Co.*, 25 Conn. 9.

But the waiver rests not simply upon something said by the agent which could be construed into an agreement of waiver, but upon something done by the agent which he was employed to do. The authorities all agree that a mere agreement to waive prepayment will not put a policy in force where it is not delivered. It is, therefore, the delivery of the policy which constitutes the ground of waiver.

It is true that in *Hallock v. Commercial Insurance Co.*, 2 Dutcher, 268, a recovery was allowed although the premium had not been paid nor the policy delivered. But the agreement for the insurance had been made *and the premium tendered*, which the agent declined to receive because the policy was not made out.

In *Trustees of Baptist Church v. Brooklyn Ins. Co.*, 19 N. Y., 305, there was a parol contract for a renewal, but no payment of the renewal premium. It was held that the plaintiff was entitled to recover. That case was substantially like the case at bar, except that the contract was made by the *officers of the company* and not by an agent. The principle decided, therefore, was materially different.

Nor does the case at bar come within the rule held in *Viele v. Germania Ins. Co.*, 26 Iowa, 9. That was a case where the risk was increased by the act of the assured contrary to the provisions of the policy. It appeared, however, that the agent assented to the use of the premises by reason of which the risk was increased. Such assent was held to be a waiver of the forfeiture. The doctrine of that case is unquestionably correct, but it rests upon the fact that the agent is made the judge as to whether a given use is an increase of risk or not. Mr. Justice BECK, who wrote the opinion, said: "The agent is charged, by the terms of the policy on which this suit is based, with the power to determine whether the risk is increased. If he so determines, he may cancel the policy and put an end to the

contract. This involves the necessity of examination of the condition of the insured property during the life of the policy, and constant watchfulness to protect the interest of the underwriters. If he determines that the risk is increased, such determination is final. Such being the great and extraordinary powers of the agent, it follows that he is clothed with the power to dispense with conditions and waive the effect of breaches thereof in contracts of insurance made by him. If he can determine that the conditions of the contract have been broken, surely he can also determine that they have not been broken."

In our opinion there is nothing in this doctrine that affords support to the proposition that an agent who has not the power to make the contract of insurance can bind the company by his contract to an indefinite postponement of the payment of a renewal premium, and keep the policy in force in contravention of its provisions. In *Bouton v. The American Mutual Life Insurance Company*, 25 Conn. 542, the premium was actually paid to the agent, though after the day it fell due. It was held that though the agent had power to make the contract of insurance, and had power to receive the premium when due, he had no power, without an express authorization, to bind the company by receiving it after it was due. Substantially the same doctrine was held by implication in *Insurance Company v. Norton*, 96 U. S. 234. In that case a recovery was allowed where the agent had extended the time of payment of premium, but the right of recovery was made to turn upon the ground that the jury was justified in inferring from the practice of the company an express authorization of the agent to extend the time of payment. There was no pretense that the agent by virtue of his power to make the contract of insurance and collect premiums could extend the time of payment. It is not uncommon, we think, for agents to keep a policy in force after a renewal premium becomes due, without actual payment by the assured. The agent sometimes credits the assured or issues a receipt to him without payment by him, the understanding being that the agent becomes personally liable to the company, and the assured to the agent. In such case as between the assured and the company, the premium is regarded as paid. See *Flanders on Insurance*, page 164, and cases cited.

There is a class of cases where a receipt of premium by an agent paid when due has been held to be a waiver of a forfeiture incurred by a violation of a condition of the policy. See *Walsh v. Aetna Life Insurance Company*, 30 Iowa, 133, and cases cited. But where an agent who is authorized to receive premiums receives a premium paid when due, he is acting within the scope of his general authority. The assured has a right to suppose that the payment is valid; that it becomes a payment to the company; and that the company by receiving it, if it receives it with knowledge of the forfeiture, waives the forfeiture. We have been unable to discover any rule in the law of insurance which would justify us in holding that an agent can bind the company by his consent to a postponement of a payment of a renewal premium, and keep a policy in force contrary to its provisions, unless he is expressly authorized to do so.

It has been suggested that Kennedy's authority to receive payment of premiums should be deemed to include the authority to bind the company to carry the risk without payment, because it might be for the interest of the company to do so. But authority to an agent to do one thing does not include, by implication, an authority to do another thing, merely because it might be for the interest of the principal to do the other thing. An agent has implied authority to employ the usual and necessary means to accomplish what he is expressly authorized to do. In the case at bar the carrying of the risk without payment of the premium was not necessary to enable the company to collect the premium; that was collectible without any new contract or consideration. In no view, then, did Kennedy have the implied power to make the contract relied upon.

In our opinion the rule contended for by plaintiff would have a tendency to impair the value of all insurance, both fire and life. If insurance agents can grant a valid extension of the payment of renewal premiums for a few months, as in this case, while the risk continues, they can grant such an extension for a few years, or such length of time as the policy can be renewed. No company under such rule would be safe. Liabilities would constantly tend to become disproportionate to available resources. The interests bound up in insurance are too important to be thus jeopardized.

The foregoing considerations dispose of the case without regard to the fact that the loss occurred one day after the alleged extension had expired. The evidence was not such as to justify the instruction given, nor the verdict rendered.

Reversed:

BECK, J. (*dissenting*).—The policy in the case insured the property for five years, the term to end November 12, 1880. The premiums were payable annually, the first being paid when the policy was issued, and the others secured by a promissory note payable in installments of equal sums on the twelfth day of November of each subsequent year. The whole of the condition of the policy touching the effect of non-payment of these installments is not set out in the opinion of the majority of the court. The part omitted follows what is quoted in that opinion. I here present it :

“When a promissory note is given by the assured for the cash premium it shall be considered a payment of such premium, provided such note is paid at or before maturity, but if such note, or any part thereof, shall remain unpaid and past due more than thirty days at the time of any loss or damage, then this company shall not be liable to pay such loss or damages happening during such default, and no attempt to collect such note or any installment of premium upon the installment note aforesaid, whether by legal process or otherwise, shall be deemed a waiver of any of the conditions of this policy, or have the effect to renew the policy ; but upon payment by the assured of the full amount of such note or installment, as the case may be, and all cost that may have accrued, then this policy shall be in force as to losses happening thereafter, unless inoperative or void from some other cause.”

The agent who, as plaintiff claims, extended the time of payment, was expressly empowered by the defendant *to collect* and remit the premium due upon notes of the kind given by plaintiff.

The case presents this state of facts : The policy was an existing contract at the time of the destruction of plaintiff's property. But on account of the failure of plaintiff to pay an installment of the note which had fallen due, the contract could not be enforced against defendant if the breach of the condi-

tion were interposed as a defense. The contract had not ceased to exist; it was binding upon the parties, and defendant would become again liable thereon upon payment of the premiums. The case does not, therefore, require us to determine whether the agent was authorized to enter into a contract of insurance. It is not claimed that his acts had that effect; nor, indeed, did the agent, in the act of giving plaintiff time upon his note, make any contract for the company. The whole contract between the parties is embodied in the policy. But by extending the time of payment, the agent dispensed with the strict performance of the contract of the plaintiff to pay the premium on the day stipulated. The opinion of the majority of the court, I understand, concedes that if the agent did extend the time of payment, and had authority to do so, his act would operate as a dispensation of the condition of the policy and operate as a waiver of the forfeiture resulting from the non-payment. The only question, then, to be determined involves the power of the agent to make an arrangement with plaintiff that he should have further time for the payment of the installment then due or about to fall due.

The agent was authorized *to collect* the premiums. It cannot be doubted that if the plaintiff had paid to the agent the premium after default, the policy would have again attached. The agent could have enforced the payment under the terms of the policy. Thus far he was clothed with authority, upon the exercise of which, at his discretion, depended the binding force of the policy.

His authority to collect the premium could be exercised in such a manner and at such times as the interest of the defendant determined by the agent required. Surely, the authority to collect the premium was not so limited that it could not have been exercised after default by plaintiff. It follows that the agent, before default, could arrange with the plaintiff to extend the time in the exercise of his authority to collect, or in other words, could extend the time for payment.

It is not necessary to hold that the agent had authority to enter into a contract for the extension of the time upon the note. This would require authority to make a new contract under which the old contract would be modified. But the extension of indulgence to the plaintiff under an agreement

that the insured shall not be prejudiced by delay is quite a different thing.

I will illustrate this point by a supposed case. A enters into a contract for the sale of lands to B, payment to be made upon a specified day, the time of payment being of the essence of the contract. The note given by B to secure the purchase money is placed in the hands of C for collection, who agrees with B that indulgence shall be extended for a time agreed upon. In such a case the condition as to time is waived. The agent's power to collect the money was exercised in granting indulgence. I know of no reason why the same doctrine should not apply to policies of insurance. It is based upon the plainest reasons. Parties to a contract should not be enabled to lay ambuscades and pitfalls for one another; they should not, by professions of kindness and indulgence, induce the violation of the contract, and then take advantage of the default.

The agent of defendant in this case was authorized to collect the premium; there was no limitation upon this authority. He, therefore, could, in the exercise of his authority, do all acts that could have been done by his principal in collecting the premium. He could grant indulgence and delay in the exercise of his authority.

As I have said, the agent made no new contract; his act in granting indulgence does not demand the exercise of authority to make a new contract.

My brothers in the foregoing opinion express the thought that the agent could not grant indulgence, unless he had the authority to enter into a contract of insurance. They think that the time for the payment of premiums can only be extended by insurance agents when they deliver the policy, or do some other act required in the execution of the contract. That agents possessing such authority, and under such circumstances may waive conditions as to the time of payment, does not support the conclusion that indulgence, or, if you please, extension of time, may not be granted by an agent employed to collect premiums after the policy has attached. In my opinion the time at which an agent may perform acts under his authority, if not prescribed by the principal, rests in his discretion, to be exercised for the interest of the principal. The

agent of defendant was authorized to collect the premium; he determined that he would not collect it, or demand its payment, until plaintiff received his pension, and so informed plaintiff, who, relying upon the arrangement, did not pay the premium before his house was burned. As the act of the agent in extending the time of payment was done in the exercise of authority to collect the premium, the defendant is estopped to enforce the forfeiture for the non-payment of the installment.

The conclusion I reach, that the payment of the installment on the day it fell due was dispensed with, and the forfeiture waived by the act of the agent in extending the time of payment, is supported by the following authorities: *Viele v. Germania Insurance Company*, 26 Iowa, 9; *Walsh v. The Aetna Life Insurance Company*, 30 id. 133; *Young & Co. v. Hartford Fire Insurance Company*, 45 id. 377; *Insurance Company v. Norton*, 96 U. S. 234; *Mississippi Valley Life Insurance Company v. Neyland*, 9 Bush. 430; *Sheldon v. Connecticut Mutual Life Insurance Company*, 25 Conn. 207; *Bouton v. American Mutual Life Insurance Company*, 25 Conn. 542; *Trustees of Baptist Church v. Brooklyn Insurance Company*, 19 N. Y. 305; *Bowman v. Agricultural Insurance Company*, 59 N. Y. 521; *Hallock v. Commercial Insurance Company*, 2 Dutcher, 268.

In my opinion the judgment of the District Court ought to be affirmed.

NEW YORK COURT OF APPEALS, 1871.

MALLORY v. TRAVELERS INS. CO.

(47 N. Y. 52.)

Presumption that death by drowning is by accident rather than by suicide.

Appeal from judgment of the General Term of the second judicial district, affirming a judgment entered upon verdict in favor of plaintiff.

This action is brought upon an accident policy of insurance issued upon the life of W. S. Mallory for the sum of \$2,000, for the benefit of and made payable to plaintiff. By the policy the defendant agreed to pay the sum insured, and "within ninety days after sufficient proof that the insured, at any time

within the term of this policy, shall have sustained personal injury caused by any accident within the meaning of this policy and the conditions hereunto annexed, and such injuries shall occasion death within three months after the happening thereof." "And if the insured shall sustain any personal injury which shall not be fatal, but which shall absolutely and totally disable him from the prosecution of business, then on satisfactory proof of such injury, compensation shall be paid to him," etc. "Provided always that no claim shall be made under this policy by the said insured in respect of any injury, unless the same shall be caused by some outward and visible means, of which proof satisfactory to the company shall be furnished," etc.

GROVER, J.—The question whether the plaintiff had an insurable interest in the life of the deceased does not arise in this case. The insurance was upon the life of W. S. Mallory. The policy was procured by him, and he paid the premium therefor, and made the loss payable to the plaintiff (his daughter) or legal representatives. This, in effect, was a policy procured by him upon his own life, and an assignment thereof to the plaintiff. *Grosvenor v. The Atlantic Fire Ins. Co.*, 17 N. Y. 391; *Rawls v. American Mutual Ins. Co.*, 27 N. Y. 282. There was no error in denying the defendant's motion for a nonsuit. No ground for such motion was stated, and in such a case the well-settled rule is, that there is no error committed by denying it, although there may be a defect in the plaintiff's proof, if the defect was such that it might have been supplied if pointed out upon the motion. But there was no such defect. The proof showed that the deceased had been staying at his brother's at Bridgeport, Conn., for about a week; that he left the house on Sunday, and was last seen alive on that day, walking toward a railroad bridge over a culvert, across a stream emptying into the sound, where the waters of the sound set, to some extent, into the land and up the stream at high tide; that this bridge was used by pedestrians to cross the stream to a considerable extent; that the body of the deceased was found in the pond not far from the bridge, in a few days thereafter. The policy was one embracing cases only where the death was caused by an injury received from an accident.

From the facts above it appeared either that the death was caused by such an injury or the suicidal act of the deceased; but the presumption is against the latter. It is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person. That it resulted from the former cause was to some extent rendered more probable by the wound upon the head of the deceased, and the break in the corresponding part of his hat. Although this wound might have been made after the deceased was in the water, or while falling in, yet it was for the jury to say how it was caused, and to determine its effect upon the question whether the death was the result of an accidental injury, or whether the deceased had destroyed his own life. The court did not err, in charging the jury, that the conversation between the president of the company and the deceased had no bearing upon this particular application. It was proved that the deceased at the time of death was, and for some time previous to procuring the policy had been, a canvasser for applications for insurance with the defendant; that in an interview with the president, the deceased remarked that he could procure a great number of applications in Newark: to which the president in substance replied, that he must be cautious, as the company did not wish to insure insane persons, or persons of habits of intoxication. This evidence was relied upon by the defendant to avoid the policy, in connection with the facts proved, that the deceased, twenty years before making the application, had a severe fever, during which he was more or less insane, but that after recovering therefrom he was sane until three or four years before that time, when he was insane, from what cause did not appear, and was placed for about three months in a retreat for such persons, when he was discharged cured therefrom, from which time to his death he more or less attended to business, was sane, or at most the evidence of a want of sanity was so slight during any portion of this period as hardly warranted the submission of any question thereon to the jury; that the deceased did not state to the company, upon making application for the policy, that he ever had been insane, but did state there were no circumstances which rendered him peculiarly liable to accident. This general conversation with the president some time before the application had no tendency to show a fraudulent concealment

of material facts upon making the application. There was no evidence tending to show that he was then insane, or that he had been for some time before, and this conversation did not convey to his mind the idea that the company regarded those that a long time before had been insane, as peculiarly liable to accidents. The construction put upon the contract in the charge was correct. That construction was, that the terms outward and visible means applied only to injuries not causing death in three months, but to such only as entitled the deceased to certain sums from the company during their continuance, as provided by the policy. The part of the charge to the effect that if the wound led to the cause of his death, then it would be an accidental death, could have been understood only in the sense of the wound being produced by an accident, but that this, not causing death, did cause him to fall into the water, where he died from drowning, then the death was accidental; so understood, it was entirely correct. The judge was right in charging that, if the deceased did not conceal any fact which, in his own mind, was material in making the application, the policy was not void. *Rawls v. The American Mutual Life Ins. Co.*, 27 N. Y. 282; *Van Lindenau v. Desborough*, 15 Eng. C. L. 290; and *Valton v. National Fund Life Ins. Co.*, 20 N. Y. 32. Cases cited by counsel were cases where false answers were given to inquiries made, and have no application to this case. The counsel was mistaken in his exception to the charge, that if the deceased was insane so that he could not know right from wrong, that his death in such a condition was an accident, which would entitle him to recover. The judge did not so charge. The judge did charge that if his condition at the time was such that he could not distinguish right from wrong, if it was such that he could not be held in his own mind to know that he was doing an act which would produce death, then he was an involuntary agent, and the result of that involuntary act producing death was an accident. This part of the charge was not excepted to. Hence no question arises thereon for review by this court. The defendant can sustain no injury from the want of a proper exception, even if right in its law, for the reason that there was no evidence tending to show that the deceased did not know that keeping his head under water for a sufficient time would

cause his death. It was wholly immaterial whether Lawton ever told Johnson that the deceased was insane, or when he told him so. The defendant could not have sustained any injury from this testimony. The judgment appealed must be affirmed, with costs.

All concur.

Judgment affirmed.

NEW YORK COURT OF APPEALS, 1884.

MURRAY v. NEW YORK LIFE INS. CO.¹

(96 N. Y. 614.)

Exemption from liability if death in consequence of violation of law.

ANDREWS, J.—The policies upon the life of Wisner Murray each contain a condition that, if the insured “shall die in, or in consequence of, a duel, or of the violation of the laws of any nation, State, or province,” the policy shall be void. The assured died from a pistol shot from a pistol in the hands of one Berdell, upon whom the deceased and his brother had committed a violent assault, and the defense is based upon this condition in the policy. It is an undisputed fact that the brothers, acting in concert, planned the assault upon Berdell. They stationed themselves in the waiting-room of the station, awaiting his arrival, and, when he entered the room, Spencer Murray seized him by the arms from behind and held him, while his brother, Wisner Murray, standing in front, beat him over the head and face with a raw-hide, striking from ten to twenty blows, inflicting severe and painful wounds from which the blood flowed profusely, covering his face and clothing. The assault was a brutal one, and, so far as appears, without provocation. Berdell testified that in the struggle to escape from Spencer Murray his hand was involuntarily brought into contact with his hip-pocket, containing a pistol. He drew it from his pocket, and it appears that Wisner Murray, seeing the pistol, started toward the lunch-counter, keeping his face toward Berdell and calling on his brother to “hold him and not to let him shoot.” Wisner Murray jumped over the lunch-counter, and, as he was passing through a door into another room, the pistol in the hands of Berdell was discharged, the ball hitting the assured in the forehead, causing his death.

Berdell, who was called as a witness by the defendant, testified, in substance, that the firing of the pistol was accidental, and was caused by the sudden jerking of his arm by Spencer Murray, who was still holding him, and that he had no intention of firing at the deceased. It is established by the great preponderance of testimony that, until after the pistol was fired, Berdell was in the grasp of Spencer Murray, and was struggling to release himself. Berdell also testified that the deceased, during the time he was retreating, had a pistol which he pointed at the witness as if aiming at him. He is confirmed as to the deceased having a pistol by another witness, and a pistol was found, after the affray, on the floor near where the deceased fell, a distance of about thirty feet from the place where Berdell was when the shot was fired. The witnesses differ as to the time which elapsed between the commencement of the affray and the firing of the pistol, the highest estimate given by any witness being thirty seconds.

It is not disputed that the assault made upon Berdell was a violation of law. But it is contended that as, according to the evidence of Berdell, the firing was accidental and not intentional, and as it also appears that it happened after the assured had abandoned the combat, his death was "not in, or in consequence of, a violation of law," and was not, therefore, a death excepted from the operation of the policy. The argument is that death under such circumstances, from an accidental shooting, cannot, in a legal sense, be attributed to the violation of law which preceded it, so as to bring it within the condition of the policy. There must, no doubt, be a relation between the act causing the death and the violation of law to avoid the policy. In the case of *Bralley v. Mutual Benefit Life Insurance Company*, 45 N. Y. 422, involving the construction of a similar clause in a life policy, the court said: "It seems to be clear that a relation must exist between the violation of law and the death to make good the defense; that the death must have been caused by the violation of law."

It may be that the proviso in the policy was primarily intended to exempt the company from the hazard of a death from violence to which persons engaged in the execution of criminal acts are exposed, and especially where the unlawful or criminal act is such as is likely to be met by forcible resist-

ance. It is plain that a homicide committed in self-defense would be a death within the condition ; so, also, a death at the hands of justice in punishment for crime. The death in these cases would be the direct and legitimate result of the criminal act. Another case, a little further removed from the violation of law as its cause, would be one where a party assailed, in the heat of passion engendered by the act of the assured, on the moment takes the life of the aggressor, although the provocation might not be a legal justification of the homicide. Such a death, we conceive, might be within the condition, depending upon circumstances. If the violation of law in which the deceased was engaged was trivial, although calculated to some extent to excite opposition or resistance, but the taking of life was a result which no reasonable man could have contemplated as likely to follow from the unlawful act, there would be no such relation between the act and the death that the former could be said to be the cause of the latter. But if, on the other hand, the party killed was engaged in committing a violent assault, the natural result of which would be to arouse the passions and excite the anger of the party assailed, and in the heat of passion he killed his assailant, the death would, we think, be the result of the unlawful act within the meaning of the policy, although the party causing it exceeded the bounds of lawful resistance. As between the company and the assured; his violation of law ought justly to be treated as the cause of the death, because the deceased must be assumed to have known the danger he incurred, and that a party resisting an assault under such circumstances, and whose anger is naturally excited, does not mark with exactness the line which separates lawful defense from excessive and unjustifiable force.

We have so far had in view cases where the death of a person insured was the result of the intentional act of another, or of the law. But while it is probable, as we have said, that cases of this kind were primarily in the contemplation of the parties to the contract, the words of the condition are too broad to permit them to be confined to this narrow and rigid limitation. The proviso clearly exempts the company from all risks of life which attend the violation of law, which are the natural and reasonable concomitants of the transaction. Prize-fighting is prohibited by law, and is attended with some

danger. Suppose in such a friendly contest, by mishap one of the combatants strikes a blow which causes the death of the other. Would a death under such circumstances be a death in the violation of law within the policy, although there was no intention to kill? However this might be answered, we think it is clear that there may be a death in violation of law within the meaning of the policy, although not intentionally inflicted, and although it was not occasioned by the act of another. A burglar who, in consequence of a misstep, or to escape detection, falls or jumps from the roof of a house which he is attempting to enter, and is killed, dies in violation of law as plainly as if he had been shot by the owner in defense of his dwelling. In the former as in the latter case, the death results from the criminal act, within the policy, as a natural and reasonable consequence, because, although the immediate cause of the death was the fall, yet the exposure to the danger was encountered in the prosecution of the criminal purpose. Another case may be stated, of which there may perhaps be more doubt. Suppose the assured in this case, instead of having been killed by the pistol, had, in the struggle with Berdell, ruptured a blood-vessel, or, being predisposed to heart disease, it had been brought on by the excitement of the affray, and he had died from either of these causes in the midst of the struggle. Death from a rupture of a blood-vessel, or from disease of the heart, occurring independently of any violation of law, would be covered by the policy. The company assume the risk of death from these causes under ordinary circumstances. But do they assume such risk when the immediate, exciting cause of the death is a struggle originating in a criminal assault in which the deceased was engaged at the time? To exempt the company, must the death result from some peculiar and special risk connected with the commission of crime? It seems to us not, and that it is sufficient to bring a case within the condition, if there is such a relation between the act and the death that the latter would not have occurred at the time if the deceased had not been engaged in the violation of law.

In the case before us it is said that the shooting was accidental and not voluntary or intentional, and consequently was not a death, in or in consequence of a violation of law. What incidents would attend the assault by the Murrays could not

be foreseen. They probably did not know that Berdell had a pistol, and if they had known it, they could not have anticipated that it would be discharged in the manner stated by him. But they took the risk of his resistance to any extremity. They took the risk of an injury which might happen to them in consequence of his handling a deadly weapon, whether such injury was intentional or accidental. The case is to be considered under the actually existing circumstances of the assailants and assailed, and if the killing under these circumstances was not an unnatural result of the attack, the case is within the condition. Assuming that Berdell's statement that the shooting was unintentional was binding on the jury, and that the killing was accidental, yet the accident was the result of the struggle of Berdell to free himself from the grasp of Spencer Murray, and the jerking of his arm by the latter. The accident, so called, was caused by the assault, and the risk of injury from the discharge of the pistol was occasioned by the criminal act of the Murrays. The claim that Wisner Murray had abandoned the combat before the firing of the pistol, if true, does not meet the difficulty. He was a party to the original encounter. The struggle with Spencer Murray was continuing when the pistol was fired. If the shot had killed Spencer Murray, and he had been the person insured, there could, we think, be no doubt. It killed his brother, who was unfortunately within its range, but at a time when it is said he was attempting to escape from the scene. But he was not relieved from responsibility for the act of his confederate in a crime jointly planned, who was continuing the assault, and the act of Spencer Murray in jerking the arm of Berdell, causing the explosion, is as to the company the act of both.

We are of opinion, assuming as true to its full extent the statement made by Berdell, that the defense was established. If, as there is some slight evidence to show, Berdell fired the pistol after he had escaped from Spencer Murray, the case is not changed. At all events the jury upon that theory of the case might well have found, and could not justly have found otherwise, that it was fired by Berdell in the heat of passion, and under circumstances which, if they did not fully justify him, made the firing and the consequent death a natural and reasonable consequence of the assault. Whether, therefore,

the firing of the pistol was intentional or not, or whether Wisner Murray had or had not abandoned the combat, the jury upon the evidence were justified in finding as they did by the general verdict, that the assured died in, or in consequence of, a violation of law. This conclusion answers the points made upon the exceptions to the charge.

Judgment affirmed.

CHAPTER XVIII.

CLAUSES OF THE ACCIDENT POLICY.

NEW YORK COURT OF APPEALS, 1890.

BACON v. U. S. MUT. ACC. ASSO.

(123 N. Y. 304.)

Whether a loss by accident or by disease.

THE policy, or certificate, was in general similar to the form of accident policy given in the appendix, but one of the stipulations was worded as follows: "Benefits under this certificate shall not extend to any death or disability which may be caused, wholly or in part, by bodily infirmities or disease existing prior or subsequent to the date of this certificate, or by poison in any manner or form."

Verdict for plaintiff, affirmed by General Term Supreme Court.

PECKHAM, J.—I think the deceased died from disease within the meaning of the language used in the policy sued upon in this action, and not from an accident causing the disease. The disease itself was not caused by an accident within the meaning of the policy.

The case of *Paul v. Travelers Ins. Co.*, 112 N. Y. 472, has been cited by counsel for the respondent as decisive of his case. Upon the question decided the case is conclusive, and we have no disposition to alter our views as expressed therein. But upon the question of whether the deceased in this case died from disease, as above stated, the case of *Paul* is without the slightest analogy. In that case the deceased came to his death by accidentally inhaling illuminating gas. This gas is a manufactured article, gathered into large reservoirs, and thence distributed through pipes into almost every house in a city or

village. The deceased accidentally, while asleep, inhaled this gas and was suffocated. This would seem to be a plain case of death from accident, and it was found that the gas was not purposely inhaled. The death being the result of accident, it was then held that such death was caused by external and violent means, within the meaning of the policy. This also seems plain enough. The gas was external, and it was not inhaled voluntarily—*i.e.*, intentionally and for the purpose of being killed thereby. It might naturally be said—as in effect it was—that death, as the result of accident, imports an external and violent agency as the cause. There was no question in the *Paul* case that the deceased came to his death through disease; no pretense could properly be made as to death from disease in such a case. If the deceased had been asleep in a room into which a large quantity of water was poured through the accidental breaking of a water-main, and in consequence thereof he had been drowned, no one would deny that the death was caused by accident, and was not the result of disease, as that word is generally used among men. There is no difference in the case in principle if the death, instead of being caused by water which was visible, was caused by gas which is invisible. In neither case could the idea even suggest itself that death was caused by disease. But in the case before us the facts are entirely different.

The deceased died, as is said and as will be here conceded, from malignant pustule. It is caused, as the plaintiff's witness testified, by the infliction upon the body of a certain kind of animal substance, contact with diseased or putrid animal matter; this acts by producing, at the point of contact with this matter, a papula, something like a flea bite, which rapidly becomes a vesicle, a blister-like affair, and then a pustule; this is accompanied by a great deal of swelling in the parts immediately around it, and a great deal of pain in the individual; the glands in the vicinity become infiltrated with blood and pus, and become dark red or even black in color; the neighboring glands become involved; then comes, almost immediately after or together with these signs, a great prostration, and the patient dies in a short time, five to eight days generally, the extreme limits being from twenty-four hours to sixteen days; he dies of exhaustion.

As to the cause of the pustule, the witness stated that the virus comes from the hide, or hair, or wool of animals suffering from this disease; from their flesh sometimes, or it may come from the feathers of birds that have been feeding upon this peculiar kind of carrion; it may be communicated directly, that is, by the immediate contact of the individual with it, by his touching it or handling it and then bringing the matter in contact with the skin or thin mucous membrane; or it may be transported, as there are very many cases known, by insects, flies, mosquitoes, that have been feeding upon this, carrying it away and depositing it upon individuals. It is commonly known as malignant pustule, or charbon, or anthrax; they are all synonymous terms. It has been called wool-sorter's disease, because it happens among people that handle wools and hides, such as tanners, butchers, and herdsmen, and those people that are engaged in business where they are brought in contact with that sort of thing.

In answer to the question, "How rare is malignant pustule?" this same witness for the plaintiff answered: "In the eastern parts of this country it is pretty rare; there have been some epidemics reported in America; in the eastern part of Massachusetts, I think about twenty years ago, there were quite a number of cases among the hairworkers, people that take the hair that comes from abroad and make mattresses of it."

The witness thus designates the difficulty as an epidemic, which word is so frequently used in connection with disease as almost to be synonymous therewith. It was undoubtedly so used in this instance by the witness, who thus described malignant pustule as a disease, when referring to its frequency in Massachusetts some years ago. The word epidemic would scarcely be used to express a frequent occurrence of accidents. The witness also said that he has seen it termed in one standard authority as an acute infectious disease. He said that the special poison of the disease has been found to be a particular kind of bacteria, "*bacillus-anthrax*." The following question was put to the witness: "Is it not so that anthrax is an acute, infectious malady, which breaks out commonly in an epizootic or enzootic manner, and is not infrequently sporadic in herbivorous animals and swine, and is transmissible to a great number of other animals, as well as to mankind?" The answer of

the witness, after some fencing, was, "Yes, I think that is correct."

Malignant pustule differs, according to this same witness, from diphtheria, small-pox, or scarlet fever, in the single fact that this is a particularly poisonous animal matter, and it has one particular germ from which it originates, as small-pox has another, and hydrophobia another, and the cause of the difficulty in each case is some form of bacteria, transmissible to mankind. It can be contracted through eating the flesh of animals subject to the disease. The bacillus is very small, so small that it may enter in the pores of the skin, and an abrasion of the skin is not necessary, but might quicken the result. The forming of the pustule upon the skin is the product of the poison.

Another witness for the plaintiff, who was a physician, said that he understood malignant pustule to be a development of the particular bacilli in the system radiating from the point of contact. He added that the contagion might be internal as well as external, taken through the mouth or through the nose, and it is generally considered an acute infectious disease.

Both these learned gentlemen, however, refused, themselves, to designate malignant pustule as a disease.

Dr. Harris defined it as "a pathological condition and succumbing of the body to the infliction of this particular poison." Dr. Bailey says he considers it as a "pathological condition following this particular inroad of this particular kind of bacilli."

We all know that "pathology," as used generally, means that part of medicine which explains the nature of diseases, their causes and symptoms. A "pathological condition" means neither more nor less than a diseased condition of the body.

The insurance in this case was against bodily injuries effected through external, violent, and accidental means. It was not to extend "to any death or disability which may have been caused wholly or in part by bodily infirmities, or disease existing prior or subsequent to the date" of the policy, "nor to any case except where the injury is the proximate or sole cause of the disability or death." There cannot be the slightest doubt that malignant pustule is regarded generally, by those who have but the usual acquaintance with such matters, as a

disease. Every particle of testimony given by the doctors called by the plaintiff, shows clearly, to my mind, that it is so regarded generally in the medical world, and that it is only when these doctors are asked to define the case in a manner to suit their refined notions of scientific and artistic accuracy that they define the trouble as a "pathological condition of the body;" in the one case, "succumbing to infliction of this particular poison," and in the other, "following this particular inroad of this particular kind of bacilli."

The difference between the cause of this condition and the causes of typhoid fever, tuberculosis, small-pox, scarlet fever, and such like diseases, is that this particular condition is caused by different bacilli from the others, and they come in contact with the skin or enter into its pores, while in the other cases they are generally breathed in.

But no abrasion of the skin is needed to produce the contact of the bacilli, and what follows from such contact seems to be as plainly a disease as in the case of small-pox or typhoid fever. The question then is, even assuming that some particular physicians refuse to call this a disease and describe it as a pathological condition, whether it is not a disease within the meaning of that term as used in this policy? Taking all the facts testified to by these physicians of the plaintiff, including their own special description of this condition of the body, and it seems to me there can be no intelligent, rational doubt that the insured died from a disease attacking him subsequent to the issuing of the policy. He did not die from any accident, within the provision contained in the policy defining an accident. The definition given by the physicians for the plaintiff, as to the difficulty being a pathological condition of the body and not a disease, is upon these facts entirely too fragile to base a recovery upon, and the distinction between a disease and a pathological condition of the body is, with reference to this case, much too refined for common acceptance. It seems to me clear that the meaning of the words used in the policy cover just such a case, and that the parties never intended that a cause of death which to all outward appearances, and to the world in general, was a disease, should be converted into a "pathological condition" of the body caused by an accident.

The judgment should be reversed and a new trial ordered; costs to abide the event.

O'BRIEN, J. (dissenting).—The principal, if not the only, question in this case is whether the death of the insured was the result of accident, within the meaning of the words used in the contract, or of disease or other cause not covered by the stipulations of the parties. There is no dispute as to the fact that death resulted from the effects of a malignant sore upon the lip of the insured, which, soon after its appearance, involved the neighboring parts, producing septicemia and utter exhaustion. There were two theories as to what this local sore was. On the part of the plaintiff, it was claimed that it was what was known as malignant pustule, while the defendant sought to establish the fact that it was a facial carbuncle and, therefore, a disease, or the result of disease, within the terms or meaning of the contract. The court instructed the jury that if the sore was, in fact, a carbuncle, that the plaintiff could not recover, but that if it was a malignant pustule produced upon the person of the deceased in the manner claimed by the plaintiff, that then the plaintiff was entitled to a verdict.

The testimony of the medical experts produced by the plaintiff was to the effect that this pustule is not a disease in the strict sense of that term, but a pathological condition of the system caused by the accidental infliction of diseased or putrid animal matter, infested with bacteria or bacilli anthrax, upon the thin skin of the lip, whence the bacilli multiply and are diffused through the system. The animal virus that produces the sore comes from the hides, hair, wool, or flesh of animals suffering from the disease known as anthrax, and may be transmitted to human beings directly by the immediate contact of the individual with it, by his touching or handling it, and then bringing the matter in contact with the skin or thin mucous membrane, or it may be carried by carrion birds, or by insects, and in various other ways communicated to man and inflicted or implanted upon some exposed portion of the body. People whose business requires them to handle hides, hair, or wool, and who live in cattle-grazing regions, or localities such as the southern or western portions of the United States, are, according to the proofs in this case, more exposed to malignant pustule than per-

sons in other vocations, or who live in localities where cattle do not abound.

The insured went to Council Bluffs on the 1st of February, 1884, and, as has been stated, died there in less than two months after. He was first employed as a bookkeeper in a meat market, and later as a check clerk in the transfer department of the Union Pacific Railroad. It was shown that carloads of hides frequently pass that station, and that a large number of cattle are brought there and slaughtered in the vicinity, but there was no direct or positive proof that the deceased ever came in immediate contact with the hides, or even the flesh, of these animals.

We must accept the verdict of the jury that the deceased died from the effects of malignant pustule. Whatever an appellate court may think of the weight and force of the evidence submitted at the trial, it cannot, when there is some evidence, ignore or disregard the deliberate judgment of the body which, under our system of administering justice, is empowered and required to determine disputed questions of fact. There was evidence to warrant the finding, and in such a case, after review by the General Term, this court must deal with the case upon the principle that death was caused as claimed by the plaintiff.

Whether the malignant pustule of which the insured died was the result of animal virus coming in contact with the lip, or whether the sore was produced in some other way, was, perhaps, a more difficult question ; but in view of the testimony of the plaintiff tending to show that the infliction of this virus upon the person is the only cause of pustule, and that the insured was in some degree exposed to it, and that death generally follows contact with it in a few days, we think it cannot be said that this finding is based wholly on speculation and conjecture. It was the province of the jury to draw all proper inferences from the testimony, and while there was no direct or positive proof as to when or how the animal virus came in contact with the person of the deceased, yet the jury was warranted in finding from the other testimony in the case that in some way the bacilli anthrax were implanted upon the lip where the sore appeared, and at some time within ninety days prior to the death of the insured. Assuming that death was

the result of malignant pustule, caused in the manner claimed by the medical experts who testified in behalf of the plaintiff, the question remains whether this was "*external, violent and accidental means*," within the intent and meaning of the contract. This court has held that where death results from breathing an atmosphere impregnated with illuminating gas which in some way escaped from pipes while the insured was asleep, the beneficiary was entitled to recover under a policy containing those words. *Paul v. T. Ins. Co.*, 112 N. Y. 472. Death by drowning is included in such a contract. *Trew v. R. P. Ass'n*, 6 H. & N. 839; *Mallory v. T. Ins. Co.*, 47 N. Y. 53. So is death which may have been produced by fright. *McGlinchey v. F. & C. Co.*, 80 Me. 251.

Without attempting to collate all the cases on this point, it is sufficient to observe that the courts, both in this country and in England, have given to these words a broad and liberal interpretation in favor of the insured or the beneficiary designated in the policy. *U. S. M. A. Assn. v. Barry*, 131 U. S. 100, 121; *N. A. L. & A. Ins. Co. v. Burroughs*, 69 Penn. St. 43; *A. Ins. Co. v. Crandal*, 120 U. S. 527; *Winspear v. A. Ins. Co.*, L. R., 6 Q. B. Div. 42; *Paul v. T. Ins. Co.*, *supra*. Guided by the principles laid down in these and other cases, and by what seems to have been the intention of the parties, I am of the opinion that we should hold in this case that the infliction of animal virus by some exterior force or power upon the person of the deceased, as found by the jury, was a bodily injury, "effected through external, violent, and accidental means," producing death, within the intent and meaning of the policy, and that the defendant is liable. When death results from the accidental infliction of the animal virus upon the person, whether by handling the same, or deposited upon his person by insects or otherwise, as shown by the witnesses for the plaintiff, it cannot, I think, be said that the jury was bound to find that the malignant pustule was a disease within the conditions of the policy exempting the defendant from liability. The jury could have found, in view of the evidence, that the deceased lived in a locality, and was engaged in employments in which he was exposed to contact with this peculiar form of poison, and it seems to me that a malignant pustule produced by the deposit upon the lip of the deceased

of a particle of this animal virus, resulting in death, is as much an accident as in the case of death from breathing illuminating gas while asleep. There was evidence upon which the jury could have found that the deceased contracted the pustule in this way.

For these reasons I am constrained to dissent from the prevailing opinion in this case, and am in favor of affirming the judgment.

All concur with PECKHAM, J., except RUGER, C. J., and O'BRIEN, J., dissenting.

Judgment reversed.

SUPREME COURT OF JUDICATURE, 1881.

LAWRENCE v. ACCIDENTAL INS. CO.

(L. R., 7 Q. B. D. 216.)

Meaning of proviso, "direct and sole cause of death," where an excepted cause co-operates to produce the accident.

DENMAN, J.—During the argument of this case I have had considerable doubt as to the meaning of the condition in the policy, and I am not sure that, but for *Winspear v. Accident Insurance Co.*, 6 Q. B. D. 42, I should not have thought that the company were protected. The facts are these: The deceased person, while on a railway platform, was suddenly seized with a fit, which caused him to fall forward off the platform on to and across the railway. A locomotive engine was at that moment passing through the station; it passed over his neck and body, and he received mortal injuries, of which he then and there died. Then it is stated in the case: "The falling forward of the insured off the platform as aforesaid was in consequence of his being seized with a fit or sudden illness, and but for such fit or illness he would not have suffered death or injury as before mentioned." Now, the immediate cause of death is not in the least disputable; but there is no doubt that if he had not fallen there in consequence of the fit he would not have suffered death, and in that sense the fit led to his death. The question is whether that was merely one of several events which brought about the accident, in the sense that it caused the accident to happen by causing him to be there, or whether it was, within the meaning of this proviso, a cause of death

which would prevent the policy applying to the case. In *Winspear v. Accident Insurance Co.*, where a man, while fording a river, was seized with a fit, and so fell and was drowned in the river—a fit being undoubtedly a kind of a disease which was not within the meaning of the policy, which was very like the present one, although not exactly identical—it was held that the death did not arise from disease within the exceptions in the policy. By this present policy, if the insured shall receive any personal injury caused by accidental and external violence within the meaning of this policy and the conditions thereto, and the direct effects of such injuries shall occasion his death within three calendar months from the happening thereof, then the funds of the company shall be subject to pay the sum assured. “Provided always that this policy insures payment only in case of injuries accidentally occurring from material and external cause operating upon the person of the insured where such accidental injury is the sole and direct cause of death to the insured, or disability to follow his avocations; but it does not insure in case of death or disability arising from fits or rheumatism, gout, hernia, erysipelas, or any disease whatsoever arising before or at the time or following such accidental injury (whether consequent upon such accidental injury or not, and whether causing such death or disability directly or jointly with such accidental injury).” Now, the words that appeared to me during a part of the argument to be strongly in favor of the defendants in this case are those latter words, “causing such death or disability directly or jointly with such accidental injury.” If the words had simply been these, “this policy shall not attach in cases where the death is caused by an accident, jointly with a fit,” I should have thought it was a case in which in all probability the defendants would be entitled to our judgment. But these three last lines of the clause are merely lines in a parenthesis, and they are put in for the purpose of showing that the exception will apply, whether the disease be consequent upon the accidental injury or not, or whether the disease be one that shall have caused the death itself directly, or whether it shall have caused the death jointly with the accidental injury. But then these are words merely defining the cases in which the previous words, “arising from,” may be applicable. The words

“arising from” have already received judicial construction in the case of *Winspear v. Accidental Insurance Co.*, in which it was held that the death did not arise from the disease. It appears to me that where words are merely put in as a variation of those previously used, and which are exactly the same as those that have received a judicial construction, we cannot put a different construction upon them. I think we are bound to hold that the death arose from the engine destroying the insured by coming across him, and not from the previous fact of a fit having attacked him and so brought him there. It is far better for us to decide in accordance with *Winspear v. Accidental Insurance Co.*, on words that are really identical, so far as they operate in this case, than to gather a distinction out of words which are, after all, merely used as illustrations of the previous descriptions.

WATKIN WILLIAMS, J.—I am clearly of the opinion that the plaintiff is entitled to recover, and I desire to base my decision upon reason and principle, and not upon the decided cases. It seems to me perfectly clear, and altogether free from doubt, that upon every principle of construction and upon the true meaning of this policy, the company are liable to pay the administratrix in this case. Now, the whole case depends on the true construction of the words in the proviso, because in this case the deceased person, having fallen down accidentally in a fit from the platform of the railway on to the rails, was, while lying there, accidentally run over by a train that happened at that moment unfortunately to come up, and he was undoubtedly killed by the direct external violence of the engine upon his body, which caused his death immediately. The question arises whether, according to the true construction of the proviso, it can be said that this is a case of death arising from a fit; because, if this death did not arise from the fit, according to the true construction of the policy, the remainder of the clause does not come into existence at all, and is inapplicable. It seems to me that the well-known maxim of Lord Bacon, which is applicable to all departments of the law, is directly applicable to this case. Lord Bacon’s language in his “Maxims of the Law,” Reg. 1, runs thus: “It were infinite for the law to consider the causes of causes, and their impul-

sions one of another; therefore it contenteth itself with the immediate cause." Therefore, I say, according to the true principle of law, we must look at only the immediate and proximate cause of death; and it seems to me to be impracticable to go back to cause upon cause, which would lead us back ultimately to the birth of the person, for if he had never been born the accident would not have happened. The true meaning of this proviso is that, if the death arose from a fit, then the company are not liable, even though the accidental injury contributed to the death in the sense that they were both causes, which operated jointly in causing it. That is the meaning, in my opinion, of this proviso. But it is essential to that construction that it should be made out that the fit was a cause in the sense of being the proximate and immediate cause of the death, before the company are exonerated, and it is not the less so because you can show that another cause intervened and assisted in the intervention. Now, if the argument of the defendants be a good one, this absurdity would follow. Supposing a man went out in the field following sports, and he were to be seized with a fit, either a fainting fit or an epileptic fit, or any other fit, and had retired to one side of the field, and remained there recovering from the fit; and being there, a sportsman—not knowing he was there—accidentally shot him: it might be said, in the same manner, that the cause of death arose from a fit. It seems to me only to require to be stated, to show the entire absurdity of it. The only difference between that case and this is in the time that intervened between the time of the fit and the person being placed within the influence of the succeeding accident, which, in this case, was very short; but I fail to see, in point of reason, that there is any difference between one hour, or one minute, or one day. The break in the chain of causes seems to be equally complete. I, therefore, put my decision on the broad ground that, according to the true construction of this policy and this proviso, this was not an act arising from a fit; and, therefore, whether it contributed directly or indirectly, or by any other mode to the happening of the subsequent accident, seems to me wholly immaterial, and the judgment of the court ought to be in favor of the plaintiff.

Judgment for the plaintiff.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1883.

TUTTLE v. TRAVELLER'S INS. CO.

(134 Mass. 175.)

Exposure to obvious or unnecessary danger. Due diligence. When not for jury.

Action of contract upon an accident policy of insurance, issued by defendant upon the life of Stephen Tuttle, and made payable to plaintiff his wife.

The evidence showed that about ten o'clock in the evening of March 13, 1879, Tuttle was killed by being struck by a railroad train, while running along the tracks in front of it, for the purpose of getting on a train approaching in an opposite direction on a parallel track. The trial judge directed a verdict for the defendant, and reported the case for the consideration of the full court.

C. ALLEN, J.—The policy provides, among other things, that no claim shall be made under it “when the death or injury may have happened in consequence of exposure to any obvious or unnecessary danger.” It is also made subject to the condition that “the party insured is required to use all due diligence for personal safety and protection.” Both of these provisions were violated by the act of the deceased in going upon and along the track of the railroad, under the circumstances stated in the report. *Wright v. Boston and Maine Railroad*, 129 Mass. 440, 443. No two cases are precisely alike in their facts, and what constitutes due care must depend upon the facts of each case. But the conduct of the deceased was such as, in the words of Mr. Justice Colt, is “condemned by the general knowledge and experience of all prudent men, and is conclusive on the question of due care.” The danger was obvious, the exposure to it unnecessary, the want of due diligence clear, and the death of the insured occurred in consequence thereof. See also *Wills v. Lynn and Boston Railroad*, 129 Mass. 351; *Johnson v. Boston and Maine Railroad*, 125 Mass. 75; *Allyn v. Boston and Albany Railroad*, 105 Mass. 77; *Cordell v. New York Central and Hudson River Railroad*, 75 N. Y. 330; 70 N. Y. 119; 64 N. Y. 535; *Baxter v. Troy*

and *Boston Railroad*, 41 N. Y. 502; *McCarty v. Delaware and Hudson Canal*, 17 Hun, 74.

The plaintiff contends that it was not the exposure or negligence of the assured which caused his death, but the coming on him of the locomotive engine, the bell or whistle of which may not have sounded; that this was a new force or power which intervened, of itself sufficient to stand as the cause of the misfortune; that it was for the jury to determine whether or not the railroad corporation was negligent; and that, if so, the negligence of the assured, if it existed, was too remote to defeat the policy. *Insurance Co. v. Tweed*, 7 Wall. 44, 52; *Milwaukee and St. Paul Railway v. Kellogg*, 94 U. S. 469, 475; *Scheffer v. Railroad Co.*, 105 U. S. 249, 252. But, without speculating as to possible cases, we do not think that the doctrine relied on is applicable to this case. If a person voluntarily places himself in a position where he is exposed to an obvious danger, and the precise injury happens to him which there is reason to fear, it cannot fairly be held that the language of this policy was not intended and understood to be applicable to such a case. For example, if one while walking on a railroad track is assaulted by a robber or a dog, or is struck by lightning, his act of traveling there has no tendency to produce the injury, and is not to be deemed a contributory cause thereof. But, on the other hand, if one who goes into a battle is hit by a bullet, or if one who goes up in a balloon is blown out to sea by the currents of air, or if one who makes a railroad track his path for travel is run over by a passing locomotive engine, he must ordinarily in any legal question be held to take the risk of those results. There is in each of these cases such an association of cause and effect, that the one must be held to have contributed to the other. To hold that the death of the assured in the present case did not happen in consequence of his exposure to the risk, but from a new force or power which intervened, would be to fritter away the language of the policy by metaphysical distinctions too fine to enter into the understanding or contemplation of parties engaged in the practical business of making a contract of insurance. We must assume that the assured read his policy, and was acquainted with its language and attached some practical meaning to it. See *White v. Lang*, 128 Mass. 598; *McGrath v. Merwin*, 112

Mass. 467; *Norton v. Eastern Railroad*, 113 Mass. 366; *McDonald v. Snelling*, 14 Allen, 290; *Cluff v. Mutual Benefit Ins. Co.*, 13 Allen, 308, 319; s. c., 99 Mass. 317, 329; *Harper v. Phoenix Ins. Co.*, 19 Mo. 506.

Judgment on the verdict.

PENNSYLVANIA SUPREME COURT, 1883.

BURKHARD v. TRAVELLERS' INS. CO.

(102 Pa. St. 262.) •

Accident. Voluntary exposure to unnecessary danger. Walking or being on road-bed of railway.

Chief Justice MERCUR delivered the opinion of the court.

This case arises on a contract of insurance against injuries and death through external, violent, and accidental means. The death of the intestate was so caused. The general terms of the policy are broad enough to make the company liable. It claims exemption therefrom under certain exceptions in the policy. What rule, then, must be applied in the interpretation of this contract and its exceptions?

The true principle of sound ethics, says Chancellor Kent, is to give the contract the sense in which the person making the promise believes the other party to have accepted it. A just sense should be exercised in so interpreting it as to give due and fair effect to its provisions. 2 Kent's Com. 557. When a party uses an expression of his liability having two meanings, one broader and the other more narrow, and each equally probable, he cannot, after an acceptance by the other contracting party, set up the narrow construction. 2 Whar. on Con. § 670. Hence, when an insurance company tenders a policy to a party seeking to be insured, and uses in the policy ambiguous words, these words will be held to have the meaning most favorable to the insured, as the presumption is that on this construction he took the policy, and as the company could have avoided the difficulty by being more specific. *Id.*; *Fowkes v. Ins. Co.*, 3 B. & S. 917. The words in such case, said Mr. Justice Blackburn, ought to be construed in that sense in which, looking fairly at them, a prudent man would have understood the words to mean. *Id.* It is now well recognized as a general rule, that

when a stipulation or an exception to a policy of insurance, emanating from the insurers, is capable of two meanings, the one is to be adopted which is most favorable to the insured. May on Ins. §§ 172-179; Wood on Ins. §§ 141-146; *Allen v. Ins. Co.*, 85 N. Y. 473; *Western Ins. Co. v. Cropper*, 8 Casey, 351; *White v. Smith*, 9 Id. 186. In case of doubt as to the meaning of terms emanating from an insurance company, they are to be construed most strongly against the insurer. May on Ins., *supra*; *Fowkes v. Ins. Co.*, *supra*; *Wilson v. Ins. Co.*, 4 R. I. 156; *Bartlett v. Ins. Co.*, 46 Maine, 500; *Bowman v. Same*, 27 Mo. 152; *Ins. Co. v. Slaughter*, 12 Wall. 404; *N. A. Life & Acc. Ins. Co. v. Burroughs*, 19 P. F. Smith, 43.

The business of this company is to insure against accidents. The purpose of this policy is to pay specific damages for bodily injuries and death caused by external, violent, and accidental means. The death of the intestate was so caused. The company seeks to avoid liability under two clauses in the policy. One provides, the insurance shall not extend to a case of death or injury caused by "voluntary exposure to unnecessary danger;" the other, that "walking or being on the road-bed or bridge of any railway are hazards not contemplated or covered by this contract, and no sum will be paid for disability or loss of life in consequence of such exposure, or while thus exposed."

The insured was traveling by rail through Indiana on his way to Kentucky. The train stopped on the bridge across the Ohio River by reason of the draw part of the bridge being open. He went to the front platform of the coach in which he was riding, and stepped off, and through a hole in the floor of the bridge, causing his death. This hole was about three feet wide and four feet long. It was caused by the removal of some planks during the making of repairs.

1. Was this act of the insured a voluntary exposure to unnecessary danger?

To make him guilty of a "voluntary exposure to danger," he must intentionally have done some act which reasonable and ordinary prudence would pronounce dangerous. The uncontradicted evidence shows that several other passengers got out of the coach, and some of them in advance of the insured. They certainly apprehended no danger. It is customary for male passengers to alight when a train stops for any length of

time. No notice was given to passengers that it was dangerous to get out of the coach where it stood. So far as appears, the bridge, with the exception of this hole, was well covered with plank and entirely safe. When the intestate alighted, other passengers were standing on the bridge near the brakeman. The latter was sitting on timber that was lying on the footwalk of the bridge, and was to be used in the repairs being made. The passengers had no knowledge of these repairs. The brakeman held his lantern so placed on the floor that another timber cast its shadow over this hole, making it impossible for the insured to see it. He could see that portion of the floor lighted by the lantern, and the passengers standing thereon. He could see the brakeman near them. He stepped out of the coach in plain sight of the brakeman. He had a right to suppose he would land on a floor as firm as that on which the others stood. Neither word nor sight gave him any notice of danger. He did not approach the opening caused by the draw, and was not injured thereby.

It is true he voluntarily left the car ; but a clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist ; yet the exposure thereto without any knowledge of the danger does not constitute a *voluntary* exposure to it. The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary. The danger being unknown, the injury is accidental.

Accident is defined by Worcester to be an event proceeding from an unknown cause or happening without the design of the agent ; an unforeseen event ; incident ; casualty ; chance : and by Webster, an event that takes place without one's forethought or expectation ; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected ; chance ; casualty ; contingency.

In view of the unquestioned facts, the death of the intestate was accidental. The danger was unknown. The injury was not designed. We think there was not such a voluntary exposure to danger as to fairly bring the act of the insured within the meaning of the exception.

2. Was he walking or being on the road-bed or bridge of the railway?

He certainly was not *walking* on the road-bed or bridge; and, strictly speaking, it is doubtful whether he was *being* on either. The evidence indicates that, without touching either, he probably passed directly from the steps of the car through the hole in the bridge. We will not, however, put the case on the narrow ground that he did not come in contact with either road-bed or bridge. The language of the exception clearly implies two thoughts: One, that the insured must not be on the road-bed or bridge for any length of time; the other, that the prohibition is not to guard against injury resulting from a defective road-bed or defective railway bridge, but against the danger of injury from trains passing thereon. If the design was to apply the language to bridges defectively constructed or out of repair, it would not have been restricted to *railway* bridges. It would have included all bridges, both foot and wagon. The purpose is not to avoid liability for injuries resulting from being on bridges unsafe in themselves. The manifest intent is to exempt from responsibility for damages caused by collision with trains moving thereon. The present is not like a case between a passenger and a railway company, in which the company may be exempt from liability for damages arising from negligence of the passenger not voluntary. Nor did the act of the insured prove such a reckless exposure of his person, nor obvious risk of danger, as to bring him within the application of the rule declared in *Morel v. Miss. Valley Ins. Co.*, 4 Bush, 535; *Lovell v. Accident Ins. Co.*, 3 Ins. Law Jour. 877; *Sawtelle v. Railway Pass. Ass. Co.*, 15 Blatchford, 216, and kindred cases.

We therefore think, under the facts found, and the rules of law which we have stated, the learned judge erred in holding that the conduct of the insured brought him within either of the exceptions, so as to relieve the company from liability.

Judgment reversed.

NEW YORK COURT OF APPEALS, 1871.

NORTHRUP v. RAILWAY PASSENGER ASSUR-
ANCE CO.

(43 N. Y. 516.)

Accident while traveling by public or private conveyances.

GROVER, J.—It must be conceded that the injury received by the plaintiff's intestate does not come within the strict literal words of the contract of assurance. By that contract the respondent agreed to pay the legal representatives of the intestate, in the event of her death from personal injury ensuing in three months from the happening thereof, when caused by any accident while traveling by public or private conveyances provided for the transportation of travelers, etc. The intestate was not actually traveling upon any public or private conveyance provided for the transportation of passengers at the time of receiving the injury which caused her death. It appears from the facts agreed upon by the parties, that the intestate, prior to such time, had undertaken to go a journey from Steuben to Madison County; that the mode adopted for making the journey was by rail from Steuben to Watkins in Schuyler County, thence by steamer to Geneva, thence by rail to Madison. That the intestate, in the prosecution of such journey, had arrived at Geneva on board the steamer, and, as usual, was passing on foot from the steamboat landing to the railway station to go on board of the cars for the remainder of her journey; and while so passing from the landing to the station, a distance of about seventy rods, she slipped and fell, thereby receiving an injury which caused her death about four days thereafter. It further appears, that upon the arrival of the boat at Geneva there were usually hacks at the landing seeking passengers for any part of the village or the railroad station, but that a large majority going to the railroad station went there on foot. The question for determination is, whether at the time of receiving the injury the plaintiff was, within the meaning of the policy, traveling by a public or private conveyance. The policy must be construed so as to carry into effect the intention of the parties, so far as such intention can be determined from the language used, construed in the light of

well-known extrinsic facts, which must be presumed to have been known to the contracting parties at the time of making the contract, and in reference to which it was entered into. One fact of this character, very important in the present case, is that of the frequent change required from one train of cars to another at intermediate stations upon the same journey. Those passing from Buffalo or the Falls to New York by the New York Central, or from the former or Dunkirk to the same by the Erie, cannot be unaware of this fact. Can it be said that a passenger is not traveling, within the meaning of this contract, by public conveyance, while passing from one train to go on board another in the actual prosecution of his journey; or, for further illustration, can this be said of a passenger from New York to Dunkirk by the Erie, while going from the ferry-boat at Jersey City to get on board of the train at that place? I think that such passenger, within the meaning of this contract, and also within the fair construction of the language, is a traveler by public conveyance all the way from New York to Dunkirk, although he may walk a short distance from the ferry-boat to the train at Jersey City, or from one train to another when such changes are made at intermediate stations. An injury received while so necessarily walking in the actual prosecution of the journey is received while traveling by public conveyance within the meaning of the policy, as such walking is the actual and necessary accompaniment of such travel. There is no difference in principle between a passenger so walking and the intestate in the present case. The presumption is, that the railroad trains and the steamer run in connection, the same as the ferry-boat from New York to Jersey City with the Erie trains, and that, by means of this connection, the journey of the intestate was designed to be continuously prosecuted; and it surely can make no difference in principle that the space to be walked over in going from one conveyance to another is a few steps more or less. Nor does it affect the question, that the intestate might have procured a hack to carry her, had she so chosen. She pursued the same course that the great majority of passengers did. This she had the right to do under the contract. *Theobald v. Railway Passenger Assurance Co.* (26 Eng. Law & Equity), 432, sustains this view. In that case, the assur-

ance was against railway accident whilst traveling in any class carriage, on any line of railway in Great Britain, etc. This was held to include an injury received from slipping on the step of the car, while standing at the station, in getting out.

Judgment reversed.

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CHAPTER XIX.

CLAUSES OF THE MARINE POLICY.

COURT OF KING'S BENCH, 1809.

PARMETER v. COUSINS.

(2 Campb. 235.)

The voyage : commencement of the risk, when it attaches.

THIS was an action on a policy of insurance on ship and freight, valued at £1,200, at and from St. Michael's, or all or any of the Western Islands, to England.

The ship met with very tempestuous weather on her outward voyage, and when she arrived at St. Michael's she was so leaky that the crew were obliged to work at the pumps *spell and spell*. She was then quite in an unfit state to take in a cargo, and, there being no harbor in the island, she was in great danger from the storm, which still continued. In fact, after lying at anchor above twenty-four hours, she was blown out to sea and was wrecked.

Park for the plaintiff contended that the underwriters were clearly answerable for a loss so happening. The policy, being *at* as well as *from*, attached the moment the ship cast anchor at St. Michael's; and at any rate she had lain there twenty-four hours, so that the outward risk had completely expired. The objection of want of seaworthiness, when properly considered, was without any foundation. The ship on her arrival at St. Michael's was unfit to commence the homeward voyage; but this was unnecessary. It was enough if she was fit for the voyage when the voyage commenced. One state of seaworthiness was required while she remained *at*, and another when she sailed *from*, the place. This distinction had been settled by Lord Kenyon (*Forbes v. Wilson*, Park, 299, n.; Marsh. 155;

Smith v. Surridge, 4 Esp. 25 S. P.), and recognized by Lord Ellenborough (*Hibbert v. Martin*, Sat. after M. T. 1808). If it were not allowed, the policies on the homeward voyage would in almost every instance be vitiated; as it seldom happens that a ship on her arrival at the outward port wants no repairs, but is in a condition immediately to take in the homeward cargo. If in this case the policy on the outward voyage had expired, and the policy on the homeward voyage had not attached, how was the ship-owner to secure himself an indemnity during the whole course of the adventure?

LORD ELLENBOROUGH.—What we have to consider here is, whether the underwriters on this ship, *at and from St. Michael's to England*, be liable for a loss happening in the manner that has been described. And I am clearly of opinion that they are not. To be sure, while the ship remains *at* the place, a state of repair and equipment may be sufficient which would constitute unseaworthiness after the commencement of the voyage. But while in port she must be in such a condition as to enable her to lie in reasonable security till she is properly repaired and equipped for the voyage. She must have once been *at* the place in good safety. If she arrives at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches. Such is the present case. I do not remember any one like it; but the principles on which it must be decided are perfectly well established.

Plaintiff nonsuited.

COURT OF KING'S BENCH, 1813.

WILLIAMS v. SHEE.

(3 Campb. 469.)

The voyage : continuance of the risk, there must be no deviation.

This was an action on a policy of insurance on goods by the ship *Sir Sidney Smith*, “at and from London to Berbice, with liberty to touch and stay at any ports and places whatsoever and wheresoever, and for all purposes whatsoever, particularly to land, load, and exchange goods, without being deemed a deviation.”

The vessel sailed from Portsmouth on the 25th of September, 1812, with a fleet for the West Indies, under convoy of his Majesty's ship *Narcissus*. They arrived off Madeira on Saturday the 17th of October. The *Sir Sidney Smith* had taken in a quantity of goods for that island, which the captain had been ordered to land there, and for which wines were to be sent on board. He began to land the goods as soon as he arrived, but, not being allowed to work on the Sunday, he had not got the wines on board till the Monday at noon. The *Narcissus*, with the greatest part of the fleet, had sailed away the preceding day, and was then too far off to be overtaken. Seven or eight other ships belonging to the fleet, however, were left behind at Madeira, and they all agreed to sail together for mutual protection. With this view, the *Sir Sidney Smith* remained at Madeira till the 24th of October. She finally parted company with them off Barbadoes, and on the 19th of November was captured by an American privateer on her way to Berbice. The owner of the goods insured was on board during the voyage.

Garrow, A. G., contended that the underwriters were discharged, on two grounds: First, the ship, by putting into Madeira, and staying behind there when the rest of the fleet had sailed, had been guilty of a deviation; secondly, the captain had willfully deserted the convoy, and as this was done with the privity of the owner of the goods, who was on board, the policy was vacated.

Park, for the plaintiff, insisted, First, that the ship had a right to put into Madeira, and to stop there in the manner she had done, under the liberty given by the policy to touch and stay at all ports and places to land, load, and exchange goods; secondly, the captain could not be said willfully to have deserted the convoy, for he was anxious, if possible, to enjoy its protection; and the convoy had rather deserted him.

LORD ELLENBOROUGH.—I am of opinion that the underwriters are discharged on the ground of deviation. The liberty in the policy must be construed with reference to the main scope of the voyage insured. I am inclined to think this was not a willful desertion of convoy within the meaning of the act, as the captain appears to have acted *bona fide*, and not to have

been aware of the precise time when the convoy sailed away from Madeira. However, it is unnecessary to determine that point now; for upon well-established principles the ship was guilty of a deviation by putting into Madeira and voluntarily staying behind there for the purposes of trade when the rest of the fleet had sailed away in the prosecution of the voyage.

Plaintiff nonsuited.

COURT OF COMMON PLEAS, 1870.

LIDGETT v. SECRETAN.

(L. R., 5 C. P. 190.)

The voyage : termination of the risk, until moored twenty-four hours in good safety.

The judgment of the court (Bovill, C. J., Willes, J., and Brett, J.) was delivered by

BOVILL, C. J.—The policy in this case, which was upon the ordinary printed form of a Lloyd's policy, was effected by the plaintiffs on their iron sailing ship *Charlemagne*. The risk was described in writing to be "at and from London to Calcutta, and for thirty days after arrival;" and by the other terms of the policy was to continue until the said ship, etc., should be moored at Calcutta. Then followed the usual printed words, "upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety."

The ship left London for Calcutta, and after sustaining damage at sea arrived in the River Hooghly in the month of October, 1866. She was then taken in tow by a steam tug, and brought to moorings at a usual place of discharge within the harbor of Calcutta, where she came to anchor and was moored on the 28th of October. The captain gave the pilot the usual certificate that she was then properly moored and left in safety.

She had brought troops from England, who then disembarked, and her cargo was unloaded and completely and safely discharged by the 8th of November, with the exception of two hundred tons of iron which were left in her for ballast.

On the 12th of November she was taken from her moorings

to a dry-dock for survey and repairs ; and, in the course of her repairs in the dock, the vessel accidentally caught fire and was wholly destroyed on the 5th of December.

It was found in the case that the vessel had sustained considerable damage from striking on a reef or bank before she reached Calcutta, whereby she became much strained and injured and leaky. Considerable repairs were necessary ; and she required extraordinary pumping, which was done at first by the troops on board and afterwards by an engine and lascars from the shore, to get her clear of the water which was in one of her compartments. She was also injured in her rudder or steering apparatus, so as materially to affect her steering ; and she was in danger of breaking from her moorings, from the currents and bore of the River Hooghly ; and, if she had broken away, the defect in her steering apparatus would have further endangered her. But, notwithstanding these matters, she remained at her moorings for more than twenty-four hours as a ship, though damaged, and safely discharged her cargo.

Under these circumstances, it was contended on behalf of the plaintiffs that they were entitled to recover as for a total loss by fire ; and on behalf of the defendant, that the plaintiffs were only entitled to claim in respect of the partial loss by sea-damage before the arrival of the ship at her moorings, and that they were not entitled to claim anything in respect of the loss by fire, because such fire occurred after the termination of the risk under the policy.

If the thirty days covered by the policy are to be reckoned from the time of the ship's arrival at Calcutta, either in the sense of arrival in the port, or arrival at and being finally moored at an ordinary place of mooring and discharge within the port, then, as the fire and loss of the vessel did not occur until the thirty-eighth day after she was so moored at Calcutta, viz., the 5th of December, the loss would not come within this policy ; but if the risk was extended, and continued beyond such thirty days, by reason of the printed words "until she hath moored at anchor in good safety," and of the vessel having been moored in a damaged state as described, then the ship was covered by this policy at the time of the fire on the 5th of December, and the defendant would be liable for the total loss by fire.

Whether the thirty days were in this case to be reckoned from the arrival only of the vessel at Calcutta, or from her having been moored at anchor twenty-four hours in good safety, it is not necessary to determine, because we are all of opinion that, even in the latter view, the defendants are entitled to judgment.

Assuming, then, that the thirty days are to be reckoned from the time of the ship being moored for twenty-four hours in good safety, the question arises, what is the meaning of those words in such a policy.

We are of opinion that the meaning is not, as has been contended, that the moorings are safe, but that the words refer to the ship being in safety. The words cannot mean that the vessel is to arrive without any damage or injury whatever from the effects of the voyage; otherwise, the loss of a mast, or even a spar, a sail, or a rope, though the vessel was perfectly fit to keep not only the river, but the sea, would, contrary to all the ordinary meaning of language, prevent her from being considered as in safety. So, on the other hand, the words would not, in our opinion, be satisfied by the vessel arriving and being moored in a sinking state, or as a mere wreck, or by a mere temporary mooring.

We think also that the mere liability to damage, whether partial or total, during the twenty-four hours, by the occurrence of some or all of the perils insured against, cannot prevent the running of the twenty-four hours, because the extension of the period of risk for twenty-four hours after having moored in good safety clearly implies that, notwithstanding the safety intended, the ship is liable to partial or total loss by the occurrence of a peril insured against.

The American decision upon that point, of *Bill v. Mason*, 6 Mass. 313, proceeded on the ground that, although the ship was, during twenty-four hours after being moored, liable to damage or total loss, she was not in fact either lost or in that case even damaged. Where, on the other hand, a ship arrived in port in a sinking state, and on being moored was obliged to be lashed to a hulk in order to keep her afloat until the people on board were landed, and where she sunk on being moved toward the shore, it was held that she was not moored in safety, because the court considered that she in fact arrived as

a wreck, and not as a ship. *Shawe v. Felton*, 2 East, 109. So, where a vessel arriving in a hostile port with simulated papers had her papers immediately taken and her hatches sealed down by the officers of government, although she was not formally condemned until afterwards, it was held that she had not been moored in safety for twenty-four hours, because she was in effect within the twenty-four hours taken from her owners by the foreign government. *Horneyer v. Lushington*, 15 East, 46. Nor was a vessel which had been for a short period moored to a wharf, but within twenty-four hours was ordered into quarantine, and whilst there, but more than twenty-four hours after the original temporary mooring, was lost by a peril insured against, considered to have moored in good safety, because, as it would seem, she had not, before the loss in respect of which the claim was made, been finally moored at the ordinary place of mooring. *Waples v. Eames*, 2 Str. 1243.

Where a vessel after being moored remained in actual safety as a ship for twenty-four hours, and so that during those twenty-four hours her owners had complete and undisturbed possession of her, but afterwards she was seized in consequence of the master having smuggled before her arrival, it was held that the terms of the policy were satisfied, and that the loss by the seizure was a loss after the termination of the risk. *Lockyer v. Offley*, 1 T. R. 252. In that case, Willes, J., in delivering the judgment of the court, said (1 T. R. at p. 261): "There must be some certain and reasonable limitation in point of time laid down by the court when the insurer shall be released from his engagement. If he be liable for a month, he may be for a year, and so on. And we all think that the law on insurances would be left unsettled and in much confusion if any other time were suggested than that prescribed by the policy; viz., the continuance of the voyage and the ship's being moored twenty-four hours in safety."

In the present case, the vessel, though considerably damaged and leaky, and with one compartment full of water, existed as a ship at the time of her arrival, and she was able to keep afloat and did keep afloat as a ship for more than twenty-four hours after being moored, by exerting the means within the power of the captain. She arrived and moored at the ordinary place for unloading, and was so moored as a ship in

the possession or control of her owners for more than twenty-four hours ; and she remained as a ship and in possession of her owners for more than thirty days after the lapse of the twenty-four hours before described, and until the time of the fire by which she was totally lost.

If the underwriters are liable beyond thirty days from her being so moored for twenty-four hours, it is difficult under such circumstances to see when the liability is to end. We think the only safe rule in this case is to hold, that, after the expiration of thirty days from the arrival and mooring of the vessel, and her having remained as a vessel, and in the possession or control of her owners, though not sound, for twenty-four hours, the underwriters were not responsible. We are, therefore, of opinion that there was not a total loss within the period of risk covered by this policy, and that our judgment should be for the defendant.

Judgment for the defendant.

CHAPTER XX.

CLAUSES OF THE MARINE POLICY—CONCLUDED.

HOUSE OF LORDS, 1887.

THAMES & MERSEY MARINE INS. CO. v.
HAMILTON.

(L. R., 12 App. Cas. 484.)

Perils insured against.

APPEAL from a decision of the Court of Appeal upon a special case stated in an action brought by the respondents against the appellants, the insurance company, to recover for a loss under a policy.

The policy sued on was a time policy on the steamship *Inchmaree* for twelve months, from the 20th of August, 1883, to the 20th of August, 1884; and the subject-matter of insurance, “the hull, masts, spars, sails, boats, materials, and all stores, valued at £20,000; and machinery, shafting, propeller, boilers, and connections, including donkey-engine and boilers, pumps, and all connections, valued at £11,000.”

On the 2d of March, 1884, the *Inchmaree* was at anchor off Diamond Island, awaiting orders, and for the purposes of the voyage it was necessary to pump up the main boilers, by means of a donkey-pump and engine, in the usual way. A pipe led from the donkey-pump to the boilers, and at its junction with one of the boilers there was a check valve, capable of being opened or closed by a screw, which ought to have been kept open and clear when the boilers were being pumped up. This valve had either been left closed or had become salted up when the donkey-pump was set to work, off Diamond Island, so that the water could not pass into the boiler. The consequence was, that, when the donkey-pump was set to work, the pipes and water-chamber in the donkey-pump, and the air-chamber

therein, became overcharged, and the water was forced up into the air-chamber, which in consequence split, and the pump was thereby damaged.

It was admitted, for the purposes of the case, that the check-valve was either allowed to remain closed or become salted up by the negligence of one of the engineers, or was accidentally salted without being noticed, though reasonable care was taken by the engineers. It was also admitted that the closing or salting up, and accident, were not due to ordinary wear and tear.

The parties were unable to agree as to whether there was negligence in allowing the check-valve to remain closed or to become salted up; but as the plaintiffs contended that the defendants were liable, whether there was negligence or not, it was agreed to leave that question for trial (if material) after the decision of the case.

The questions stated for the opinion of the court were, whether the defendants were liable under the policy in respect of the loss, (1) if it could have been avoided by proper care, and occurred through negligence; (2) if it occurred accidentally, without negligence.

The Queen's Bench Division gave judgment for the plaintiffs, and this judgment was affirmed by the majority of the Court of Appeal (Lindley and Lopes, L. JJ.) Lord Esher, M.R., dissenting.

LORD HALSBURY, L. C.—My Lords, in this case a policy of marine insurance for twelve months was effected upon, among other things, a pump on board the *Inchmaree* steamer.

The adventures and perils which the capital stock and funds of the defendant company were made liable to by the policy of insurance were, of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints and detentions of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that had or should come to the hurt, detriment, or damage of the aforesaid subject-matter of insurance, or any part thereof.

It is certain that a loss or misfortune has happened to the

pump while the pump was being used for the purpose of filling the boilers of the *Inchmaree*, and the sole question is, whether the loss or misfortune which did happen was one of the losses or misfortunes against which the insuring company agreed to indemnify the owners of the *Inchmaree*. If understood in their widest sense, the words are wide enough to include it; but two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words, however general, may be limited with respect to the subject-matter in relation to which they are used. The other is, that general words may be restricted to the same genus as the specific words that precede them.

There is, perhaps, a third consideration which cannot be overlooked, and that is, that where the same words have for many years received a judicial construction, it is not unreasonable to suppose that parties have contracted upon the belief that their words will be understood in what I will call the accepted sense. And it is to be remembered that what courts have to do in construing all written documents is to reach the meaning of the parties through the words they have used.

Now, the facts here are very simple: a part of the pump was burst because a valve which should have let the water into the boiler was stopped up while the pump was being worked by a donkey-engine. On the one side, it is said that filling the boiler was necessary to enable the ship to prosecute her voyage; on the other, it is said that the accident, peril, or misfortune had nothing to do with the sea, and was in no sense of the like kind with any of the perils or misfortunes specifically enumerated.

In the long line of cases quoted at the bar, there was only one (with which I will attempt to deal presently) which enunciated any different principles of construction from those I have endeavored to set forth above, although I think there is some difficulty in reconciling the facts with respect to which some of them are decided with the principle upon which they profess to be decided; conspicuously I think *Devaux v. J'Anson* 5 (Bing. N. C. 519,) where Tindal, C. J., rests upon authorities which, as applicable to the particular facts of the cases to which he refers, hardly support the decision there arrived at.

The great difficulty I have had in this case is the decision of Lord Selbourne, L. C., and Cockburn, C. J., in the case of *West India and Panama Telegraph Company v. Home and Colonial Marine Insurance Co.*, 6 Q. B. D. 51. I cannot agree with the Master of the Rolls that that case does not, as matter of reasoning, cover the present case. With the utmost respect, I can draw no real distinction between the explosion of the boiler and the bursting of the air-chamber of the pump, nor can any real distinction depend upon whether it was steam generated by fire which caused the explosion, or air and water forced into the chamber by ordinary mechanical action. But before your Lordships that case is open to review, and I cannot think that that case is reconcilable with the principles upon which policies of marine insurance have hitherto been construed. It introduces analogy as the guide by which you are to ascertain the genus to which the different species are to be attributed; so that, in the future, one must introduce as the true exposition of general words not *the* genus you find as applicable to the species enumerated, but any analogous genus. Sea perils, or the like, become enlarged into perils whose only connection with the sea is that they arise from machinery which gives motive power to ships.

I cannot think that even were the analogy perfect—which I do not think it is—this is a satisfactory mode of ascertaining what the parties meant by the words they have used; and, as I have said, this is the real function of a court in construing an instrument. It might be reasonable for the parties to provide for such a peril, and one knows that “dangers of and incident to steam navigation” are words which have been used to provide for such casualties. But I cannot think that such casualties were in the contemplation of the parties when using the old familiar words of this policy. I think the subject-matter, marine risks, limits the meaning of the general words. I think the genus, “perils of the sea,” limits the meaning. I think the meaning attributed to these words for more than half a century, by decision, makes it probable that the parties used them in that accepted sense. I, therefore, think the judgment of the Court of Appeal wrong, and I move your Lordships that it be reversed.

LORD BRAMWELL.—My Lords, I cannot agree with the

judgment in this case. The donkey-engine was insured. The adventures and perils which the defendants were to make good specified a great many particular perils, and "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of insurance, or any part thereof." Words could hardly be more extensive, and if the question—I ought to say *a* question on them—arose for the first time, I might, perhaps, give them their natural meaning, and say they included this case. But the question does not arise for the first time. It has arisen from time to time for centuries, and a limitation has always been put on the words in question.

Definitions are most difficult, but Lord Ellenborough's seems right: "All cases of marine damage of the like kind with those specially enumerated, and occasioned by similar causes." I have had given to me the following definition or description of what would be included in the general words: "Every accidental circumstance not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of insurance." Probably a severe criticism might detect some faults in this. There are few definitions in which that could not be done. I think the definition of Lopes, L. J., in *Pandorf v. Hamilton*, (16 Q. B. D. 629), very good: "In a seaworthy ship, damage to goods caused by the action of the sea during transit not attributable to the fault of anybody," is a damage from a peril of the sea.

I have thought that the following might suffice: "All perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such."

I put it forward with distrust, but it would comprehend all the cases cited where the assured has recovered, save perhaps the *Panama* case. For example, it would include the case of the ship blown over while in dock, of the ship damaged by its moorings giving away, of the ship fired into by a ship. It would not include the cases put by Lord Esher, nor the case I put of the captain seized with giddiness dropping the chronometer into the hold; nor would it include the present case. The damage to the donkey-engine was not through its being in a ship or at sea. The same thing would have happened had the

boilers, and engines been on land, if the same mismanagement had taken place. The sea, waves, and winds had nothing to do with it.

As a matter of principle and reasoning, I think the decision wrong. I think the judgment in the *West India and Panama Telegraph Company v. Home and Colonial Marine Insurance Company* wrong on the reasoning I have used. With most sincere respect, though it is true that what the winds are to a sailing vessel, steam is to a steamer, that does not decide the question, for it is not every damage to sails that would be covered by the policy. Suppose damage by rats or mildew to spare sails. As to Lord Esher's judgment in that case, I concur in his criticism on it in the present case. And I agree with Lopes, L. J., that the word "fire" in the policy will not sustain that judgment. The Lord Justice puts the case of a spar falling on the deck while getting under sail, and being broken, and says it would be within the policy. Perhaps; but if it would, it would be because it was a loss in navigation, a loss which could not have happened except on ship. But suppose the spar was being used to erect an awning on deck to give shelter to dancers or the like, and was broken, the case would not be covered by the policy. It would not be a marine loss, not a loss with which the sea, or navigation, or the ship as a ship, had anything to do.

I do not like cutting down the natural meaning of words: there is always great difficulty in saying what should be substituted. But it is admitted that some limit must be put on those in question here. I think a proper limit would exclude this loss. So that the judgment of the Master of the Rolls is, I think, right, and that of the other judges wrong, and their decision should be reversed.

Order appealed from, and the judgment of the Queen's Bench Division reversed.

COURT OF KING'S BENCH, 1795.

GREEN v. ELMSLIE.

(1 Peake, N. P. Cas. 278.)

Capture : proximate cause of loss.

This action was on a policy of insurance on the ship *Fly*, from Exeter to London. The insurance was against capture only.

The ship, while on her voyage, was driven by a hard gale of wind on the coast of France, and was there captured by the enemy ; she did not receive any damage from the wind.

Erskine contended that this was a loss by the perils of the seas, and not by capture, and that therefore the defendant was not liable on this policy.

But LORD KENYON said, the case was too clear to admit of argument ; this was clearly a loss by capture, for had the ship been driven on any other coast but that of an enemy, she would have been in perfect safety.

Verdict for the plaintiffs.

NEW YORK COURT OF APPEALS, 1874.

BROWN v. ST. NICHOLAS INS. CO.

(61 N. Y. 332.)

Proximate cause. Conjunction of two causes, one covered by policy, namely, stress of weather ; the other excepted by policy, namely, ice.

This action was brought to recover the amount of a policy of marine insurance issued in December, 1863, by the defendant upon a cargo of hay laden on the canal-boat *George R. Hale*, on a voyage from New York to the city of Washington.

The policy contained a clause known as an "ice clause," in the following terms : "It is understood and agreed that if any boats, the cargo of which is covered by this policy, are prevented or detained by ice, or the closing of navigation, from terminating the trip, then in such case the policy shall cease to attach upon said cargo, and this company shall return the premium for the unexpired portion of said trip." There was also

a clause that the insured vessel "could touch and stay at any ports or places if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance." The canal-boat with her cargo left New York in December, 1863, and proceeded by way of the canals with a tow of other boats to Philadelphia. She left Philadelphia January 1, 1864, in a tow of about twenty-five boats, towed by four or five steam-tugs. They proceeded down the Delaware River, on their way to the Chesapeake and Delaware canals. In the afternoon the wind began to blow, increasing to a heavy gale; during the gale, the tugs were separated from the canal-boats, and the latter were drifted ashore on the same night, at a place called "Church's Landing." This was on the New Jersey side of the river, about fifteen miles from Philadelphia. When she went ashore there was some ice in the river, but not enough to interfere with navigation. During the night it formed around the boats to such an extent that the tugs could not reach them the next morning, though an effort to do so was made. The boat *Hale* continued frozen in until a thaw occurred, January 18th or 19th. After the thaw, on the morning of the 20th, the wind and ice forced the boat upon another canal-boat in such a way that when the tide went down she broke in two and sank. Four or five days afterwards the remaining canal-boats proceeded under tow by way of the canals to Washington, where they arrived safely with their cargoes. The channel of the river was open during the time that the boats lay ashore, though encumbered by floating ice. There was nothing but the action of the gale to prevent the boats from reaching the canal at Delaware city, on the morning of January 2d. After the wreck, the plaintiffs abandoned the cargo to the insurers (defendants), and claimed a total loss. The cargo was injured by contact with the water to more than one-half its value.

On the trial, the judge charged the jury that the stress of weather, by driving the vessel ashore, must be regarded as the primary cause of the loss of the cargo. To this proposition exception was taken by the defendants.

DWIGHT, C.—The sole question in this case concerns the proper construction of a clause in a marine insurance policy, commonly termed an "ice clause." It will be observed that

this is not the ordinary case of a warranty operating as a condition precedent to the attaching of the policy. It rather assumes that the policy has attached and provides for its cessation. It is rather in the nature of a condition subsequent. It recognizes the validity of the policy, and the liability of the insurers up to the time when their responsibility terminates, on the happening of the prescribed events—prevention or detention by ice, or the closing of navigation, from terminating the voyage. Until these events happen, the insurers are clearly liable for all losses occurring from the ordinary perils of the sea. When they transpire, the policy ceases to have binding effect.

The only point to be considered is, whether the boat, in the present case, was prevented or detained by ice from terminating the voyage. Was the true cause of detention, etc., the ice or the stress of weather? If the latter, the insurers are still liable, as the main clauses of the policy are applicable; if the former, the insurers are discharged.

The true construction of these words is to be sought in the ordinary rules which control the interpretation of written instruments. They are not ambiguous, and need no aid from the testimony of experts. Their signification is purely a question of law. *St. Luke's Home v. Asso. for Ind. Females*, 52 N. Y. 191.

It will be observed that there are two general modes in which it is anticipated the boat may be precluded from accomplishing its voyage—ice or the closing of navigation. These causes may operate either temporarily or permanently. Whether there was a delay by the presence of ice, or a termination of the voyage by the closing of navigation, the insurers were, in either case, to be discharged. It is plain that either of these causes must operate in the same general manner; that is, as the efficient cause of detention or breaking up of the voyage.

The facts of the present case showed that there was no closing of navigation, and no detention of boats by ice along the usual channels of navigation. A heavy gale drove the boat, on which the cargo in question was carried, on to the shore, so that she was stranded. The detention caused by her being driven out of her course was due, beyond all question, to the gale. Her detention on the shore until the ice formed

around her was due to a consequence of the gale—stranding. Did that cause cease to operate because ice formed in front of the boat and between her and the channel? Is it not, rather, the true view, that the presence of the ice *prevented the removal of the cause* which created detention, and was slowly working the destruction of the cargo?

What is the proximate cause of the loss? This is always a difficult question to determine in the case of a conjunction of causes. The policy must have, in settling this question, a reasonable interpretation, with a view to effectuate the intention of the parties. The words “detained or prevented by ice” must mean detention in the ordinary course of navigation.” The contract contemplated that the canal-boat should be moved by a tug. This motive-power was carried away by a storm, and ice subsequently formed so as to prevent it from returning. The efficient cause of the detention was the loss of the motive-power through the stress of the storm, and the ice acted only as an obstacle to its restoration. Suppose that the tug, after separation, had been captured by an enemy? Would the loss of the canal-boat have been due to the capture of the tug? Would not the true cause of its loss have been the storm which drove the two vessels asunder, and left the canal-boat at the mercy of the elements?

A well-known writer on the law of marine insurance has laid down two rules applicable to this subject, which appear to be sound, and which were approved by the Supreme Court of the United States in *Insurance Co. v. Transportation Co.*, 12 Wallace, 196. These rules are as follows: “1. In case of the concurrence of two causes of loss, one at the risk of the insured and the other insured against, or one insured against by A and the other by B, if the damage by the perils, respectively, can be discriminated, each party must bear his proportion. 2. Where different parties, whether the insured and the underwriters or different underwriters, are responsible for different causes of loss, and the damage by each cannot be distinguished, the party responsible for the predominating efficient cause, or that by which the operation of the other is directly occasioned as being merely incidental to it, is liable to bear the loss.” 1 Phil. on Ins., §§ 1136, 1137. The present case falls under the second of these rules. The predominating efficient cause

is the storm. It is well settled that an insurer is liable for all the consequences directly resulting from a peril insured against, as where a boat is lost after a storm has ceased, in consequence of damage done during a storm. 2 Pars. on Mar. Law, 261.

Suppose that in the present case a general of an army had laid down a bridge between the canal-boat as she lay on shore, and the tug in the channel, would the detention have been due to the bridge or the stranding? If a man's house were besieged by burglars, and his friends were prevented from relieving him by the sudden closing of a gate by some distinct act of persons unconnected with the burglary, would his detention in his house be due to the closing of the gate, or rather to the act of the burglars as "the predominating efficient cause"? Such an inquiry was, to some extent, involved in *Ionides v. Universal Marine Ins. Co.*, 14 C. B. N. S. 259. The ship insured against the perils of the sea went ashore. The light at Cape Hatteras, North Carolina, existing there for many years, and visible for twenty-five miles at sea, had been extinguished by the Confederate authorities to harass the United States shipping. The question was whether the cause of the loss was the peril of the sea, or the absence of the light. BYLES, J., in giving his opinion, said: "The original meritorious cause, and in popular language the cause of the loss, was the captain's being out of his reckoning. He was some fifty miles to the westward of his course, without knowing it. The absence of the light was merely the absence of an extrinsic saving power. Could that be said to be the cause of the ship's destruction? Suppose a man throws himself into the Serpentine, and the means of rescuing him are not at hand, and he is drowned, could it be said that the man is drowned because of the absence of the saving power?" In the case at bar, the detention commenced with the stranding. That detention and its concomitants never ceased until the boat was destroyed. That was the only detention existing; and the failure of the tugs to reach the boat was, in the words of BYLES, J., the "absence of an extrinsic saving power." Any other view would lead to mere speculative considerations. Suppose that the intervening ice had not formed, what certainty is there that the canal-boat could have been got off from the shore so as to have pursued her voyage? The detention occasioned by the stranding never

ceased until the dangers of the thaw came on, which, in combination with the existing causes growing out of the stranding, led to her destruction. This test has been suggested in one of the cases: Suppose that an insurance had been made in another company against the very cause of loss excluded in this—for example, the boat is insured “against detention by ice”—could there have been a recovery on the facts proved at the trial? Would it not have been successfully objected, that the loss was occasioned by the stranding, and that the detention by the ice was merely incidental to that?

Another view of the case may be suggested. The voyage terminated with the stranding. There was never a moment after that occurrence in which it was resumed. Accordingly the formation of the ice could not properly be said to detain a boat whose voyage before that formation had already come to an end. In *Bondrett v. Hentigg*, Holt N. P. C., 149, the facts were, that, of the goods insured against a peril of the sea, a part were lost and a part got on shore. This last portion was plundered and destroyed by the inhabitants of the coast, so that no part of it ever got to the possession of the insured. Gibbs, C. J., held this to be a case of total loss. The reason given is, that the portion of the goods saved from the wreck, though got on shore, never came again into the hands of the owners. The total loss was the proximate result of the wreck. This case was approved in *Ionides v. Univ. Mar. Ins. Co. supra*. In *Hahn v. Corbett*, 2 Bing. 205, goods were insured “free from capture and seizure.” The vessel was stranded off Maracaibo, and part of the cargo damaged, and both vessel and cargo seized by royalists, then in possession of the coast, as prize. There was held to be a total loss, both of the damaged and undamaged goods, by a peril of the sea. The loss was deemed to take place at the time of the stranding as to all the goods. Best, C. J., in delivering his opinion, said it was clear that the goods would never have moved, as the ship never moved. It was as if they had been cast on a rock and were completely out of reach. To the same effect is the language of the court in *Magoun v. N. E. Mar. Ins. Co.* (1 Story, 164, 165,) where it is laid down, that if there be a capture, and before the vessel is delivered from that peril she is afterward lost by fire or accident, the whole loss is attributable to the capture.

The vessel was never delivered from that peril until she was virtually destroyed and unable to perform the voyage. In such a case the insurers are liable, though the loss is followed by the operation of a peril excepted from the policy. Phil. on Ins., § 1161.

It is not claimed that *stranding* is *ipso facto* a total loss. It may and often does prove the destruction of the voyage, by the ship afterward becoming a wreck before she shall be put afloat. *Wood v. Lin. and Ken. Ins. Co.*, 6 Mass. 479; *Manning v. Newnham*, 3 Douglas, 130; 2 Phill. on Ins., § 1526. Whether it is to be regarded as a total loss or not, depends on all the circumstances of the case, as they ultimately turn out, which may relate back to the time of stranding and characterize it. It is closely analogous to submersion, and is *prima facie* evidence of total loss. *Sewall v. U. S. Ins. Co.*, 11 Pick. 90, 94. If the ship remains stranded and is subsequently lost, and it is claimed by the insurers that such loss is occasioned by a peril excepted from the policy, it must appear that it is owing to the direct effect of the excepted peril. 1 Phill. on Ins. §§ 1129, 1131. The burden of proof is thus cast on the defendant. Per BAYLEY, J., in *Levi v. Allnutt*, 15 East, 269.

It is now proper to consider the authorities cited on behalf of the defendant.

The case of *Hadkinson v. Robinson* (3 B. & P., 388, A. D. 1803,) was an insurance against capture on a cargo from an English port to Naples, with leave to join a convoy. In the course of the voyage, information was received by the master that the port of Naples was closed against English ships. The ship accordingly proceeded to another port where the cargo was sold for a small sum, whereupon the assured abandoned as for a total loss. The court held that the fear or prospect of capture in a hostile port was not equivalent to capture itself, or in its own language, that the peril must act directly and not collaterally upon the thing insured. If the principle of this case be sound, of which there is great doubt (3 Kent's Com. 293, 294), it has no application to the case at bar, where a sea peril did act directly upon the boat, and occasioned its stranding. *Forster v. Christie* (11 East, 205) is to the same general effect, Lord ELLENBOROUGH remarking that the risks insured against must be the effective cause of the loss. *Speyer v. New York*

Insurance Company, (3 J. R. 88,) simply holds, that if the event happens on which the insurers are warranted free from liability, it is equivalent to an actual termination of the risk by the landing of the goods. This, of course, is not disputed.

Livie v. Janson (12 East, 647) is much relied on by the defendants. In that case, an English ship endeavored to elude, by night, an embargo, in passing out of the port of New York; a body of ice, propelled by the tide and wind, drove her upon Governor's Island, where she was stranded. In the morning she was taken possession of by the custom-house officers, and, finally, condemned for a breach of the embargo. In an action on a policy of insurance, the court held that the loss was not occasioned by the stranding, but by the seizure, which was deemed to be the proximate cause of the loss. Two observations are to be made upon this case: One is, that the ship was engaged in the violation of law, and on account of that the seizure was made. The loss was, virtually, occasioned by the act of breaking the embargo. The other observation is, that the peril which was held to occasion the loss acted directly upon the property insured. In that aspect of the case, it falls within the rule laid down by Lord ALVANLEY, in the case of *Hadkinson v. Robinson*, already referred to, that the peril must act *directly*, and not collaterally, upon the thing insured. This was not the case in the facts now under discussion, as to the action of the ice. It acted only *indirectly* in preventing the tugs from going to the rescue of the boat. If it had reached the canal, and the storm had caused its banks to burst, and the boat had been swept out into the open fields, and ice had been formed between it and the canal—thus preventing the use of appliances for returning it to the canal—would the ice have acted directly in causing the detention? If so, and there had been no ice, would the earth that was washed out of the canal bank, and whose absence prevented the filling of the level, be a cause of detention? Or, if laborers could not be got to shovel the earth back, would the absence of them be such a cause? All these are obstacles or hindrances to the prosecution of the voyage, but none of them act directly, as causes, within the rule, either in *Hadkinson v. Robinson*, or *Livie v. Janson*.

It should be added, that there is great reason to doubt the

soundness of each of these cases. The former of them has already been remarked upon. *Livie v. Janson* has been severely criticised by text writers, and doubted in decisions. Mr. Phillips says it is surely wrong, as well as the *nisi prius* case of *Green v. Elmslie*, 1 Peake's N. P. Cases, p. 212. He adds, that these decisions need support themselves rather than suffice for the support of others.

The only other case necessary to be noticed is *Patrick v. Com. Ins. Co.*, 11 J. R. 14. In this case a cargo was insured from New York to Cadiz, and there was a clause in the policy that the insurers took no risks in port but sea risk. The ship was forced from her moorings in a violent gale, and driven on shore, where she lay above high-water mark. After the gale abated, she was forcibly taken possession of by French troops, then holding the port, and burnt with the cargo. The cargo was not injured by the stranding. The court held that the cargo was not lost through the stranding, but through the forcible act of the French.

The decision is rested solely on these doubtful cases of *Livie v. Janson* and *Green v. Elmslie*, already considered, and can, of course, be of no higher authority. It is also quite difficult to reconcile with the decision immediately preceding it in the same volume, where the court held that, on the same state of facts, the ship was lost by means of the stranding. It seems impossible to deny that the cargo, under the circumstances, was identified with the ship, and that, within the principle in *Hahn v. Corbett*, *supra*, the goods were as completely lost at the moment of stranding as if they had been cast on an inaccessible rock.

The judgment of the court below must be affirmed.

All concur.

Judgment affirmed.

ENGLISH COURT OF COMMON PLEAS, 1852.

MAGNUS v. BUTTEMER.

(11 C. B. 875.)

Whether loss by perils of the sea, or wear and tear.

Action of assumpsit on a policy of assurance on the ship *Elizabeth*, for twelve calendar months, in port or at sea, in all services, in the coast and coasting trade of the United Kingdom.

The *Elizabeth* sailed from Rochester to Sunderland. On her arrival at Sunderland, the vessel went up the river abreast of Laing's ship-yard. She had to wait four or five days before she could go in to discharge. She was moored head and stern, and floated when the tide was in, and was aground, but not dry, at low water. She took three days to discharge. The beach was hard, shingly, and steep. When the vessel took ground, she listed towards the beach about two planks. When the first tide was ebbing, a creaking noise was heard as she took the ground, and it occurred when she floated again. This happened every tide, and sounded as if something was breaking. The cabin door, which would open and shut freely when the vessel was afloat, would not do so when she was aground. After first lying on the beach the vessel made more water than usual. The mate saw that she was "hogged," after having taken the ground. He observed that some of the trenails had started, and that some of the planks had left the trenails.

The question for the opinion of the court was, whether, under these circumstances, there was a loss by perils of the seas.

JERVIS, C. J.—I am of opinion that the loss in this case was not a loss by perils of the sea, but a damage falling within the description of ordinary wear and tear. No doubt, the question is one of importance; but I think it has been very unnecessarily brought before the court; for the matter seems to have been perfectly understood and settled by all the text writers upon this branch of the law. To make the underwriters liable, the injury must be the result of something fortuitous or accidental occurring in the course of the voyage. Here the vessel, upon her arrival at Sunderland, goes up the river, and, in con-

sequence of the rising and falling of the tide, rests upon the river's bed, and receives damages. There was nothing unusual, no peril, no accident. To hold that the assured were covered, in such a case, would be virtually making the policy a warranty against the wear and tear and ordinary repairs of the vessel. I think the defendant is entitled to judgment.

MAULE, J.—I am of the same opinion, and I concur with the lord chief justice in thinking that this is a very clear case. Stevens, and the other text writers referred to, express no sort of doubt, but are evidently well acquainted with the distinction between wear and tear, for which the underwriters are *not* liable, and accidents, the occurrence of something out of the ordinary course of the voyage, for which they *are* liable. This distinction has been well understood for many years. To hold the underwriters liable in such a case as this would be tantamount to holding that the ordinary repairs of a vessel are to be comprehended within the perils insured against. The case of *Fletcher v. Inglis* was sufficiently distinguished in the course of the argument; the statement of damage there is this: "Between 9 and 10 at night, the tide having then left the vessel, a cracking noise was heard in the ship, proceeding, as the witness believed, from something breaking. Some time after this, on the return of the tide, *there was a considerable swell in the harbor, and the ship struck the ground hard several times*; in the morning eighteen of her knees were found to be broken." There were in that case some circumstances which also occur here; but there was another circumstance there which is wanting here to make the cases parallel. There was *casus fortuitus*, the swell that set in, *after which* the ship's knees were found to be broken. That, I apprehend, was the ground of the decision in that case; and that is quite consistent with the argument of Mr. Scarlett, who was not likely to lay down a general doctrine which did not meet the assent of the court, so familiar as they were at that time with insurance law. The case evidently proceeded upon the extraordinary and accidental circumstance of the great swell setting in the harbor. Suppose, instead of the swell, the case had stated, or the evidence shown, that a violent storm had arisen, and that the vessel was dashed

against a rock and injured, nobody could have doubted that that was a loss by perils of the sea. That only differs in degree from the actual case of *Fletcher v. Inglis*; but it differs very materially from the present case, which shows a mere subsiding of the ship upon the shore or beach on the receding of the tide in the usual and expected course. According to sound law and common sense, the assured was entitled to recover in that case, whereas here nothing has happened which the assured could have wished or anticipated to happen otherwise than it did happen. They intended the ship to take the ground as she did. There was no accident. We are asked, therefore, to assume a loss by perils of the sea when the facts disclosed to us absolutely negative the existence of sea peril. No instance is to be found of underwriters being liable where the voyage has been conducted to its termination without anything happening but what was expected and intended, and where the sole cause of the damage was the insufficiency of the ship to bear the ordinary stress of the voyage to which she is exposed. Authority and common sense concur in showing that this is not a liability which ought to be cast upon the underwriters.

Judgment for the defendant.

UNITED STATES SUPREME COURT, 1873.

GREAT WESTERN INS. CO. v. FOGARTY.

(19 Wall. 640.)

Total loss; warranted free of particular average.

Error to the Circuit Court for the Southern District of New York.

Fogarty sued the Great Western Insurance Company on a policy of marine insurance, and recovered a judgment for \$2,611.95 and costs. The policy was an open one, and the indorsement procured by the plaintiff on it was of insurance for \$2,250 on machinery on board the bark *Ella Adele*, at and from New York to Havana, free from particular average. The memorandum clause of the policy provided that machines and machinery of every description were warranted by the assured free from average unless general. The machinery insured con-

sisted of the various parts necessary for a complete sugar-packing machine, including, as part of it, three sets of truck-irons, and also other extra truck-irons. It was described in the bill of lading and invoice as eight pieces and eight boxes, composing one sugar-packer and three trucks.

The vessel on which these articles were being transported, from New York to Havana, just before reaching the latter city, was driven on rocks in a violent gale, was filled with water, and finally became a total wreck, and was abandoned to the underwriters. Their agent at Havana took possession, and was engaged about a month in raising the cargo. A large number of the pieces composing the plaintiff's machinery was recovered and tendered to him at Havana, which he refused to receive, on the ground that the insurance company was liable to him as for a total loss. They denied that under the circumstances of the case there was a total loss within the meaning of the policy; and the soundness of the instruction to the jury on that point, given and refused by the circuit court on the trial, was the only question now before this court.

There was very little conflict of testimony as to what was recovered, and what was its condition when tendered to plaintiff. It was all of iron. About half of it in weight was saved, and the remainder left at the bottom of the sea. That which was saved was entirely useless as machinery, and was of no value except as old iron, for which purpose it would sell for about \$50. The machinery in working order was worth \$2,250. That which was saved was much broken and rusted, so that it would cost more to repair it, polish it, and put it in order for use than to buy a new machine.

Upon the testimony offered by the plaintiff the counsel for the defendant moved the court to instruct the jury that the action could not be sustained, because it showed that there was not a total loss. The court declined to do this, and the request was renewed at the conclusion of the defendant's evidence, and again declined. Several prayers for instruction were then presented by the defendant, based upon the leading proposition, that if any of the pieces of the machinery insured was recovered and tendered in specie to the assured, there was no total loss. These were refused and exceptions taken to all these refusals, on which error is assigned here. An exception was

also taken as to the charge of the court laying down the law by which the jury were to decide the question of total loss submitted to them. That charge was in the following words:

“The meaning of the term ‘free from particular average,’ used in the policy, was that the defendants should be liable only for a total loss of the subject insured; that the subject insured was not machines but machinery, by which is generally understood the several parts or portions of machines, adapted and fitted to be put together so as to constitute a machine (in this case a sugar-packing machine), and, applying the rule of law as to what constitutes a total loss to this particular subject insured, the jury will find whether any piece or portion of the machinery insured arrived at its destination in a perfect condition, so that it could have been used with its corresponding or connecting pieces had they also arrived in good condition; in that case the plaintiffs could not recover, as the loss would not be total; but that if every piece of the machinery was so damaged by the perils insured against as to be entirely unfit for use on being supplied with its corresponding or connecting pieces, then there was a total loss of the subject insured as machinery, although the material itself might still exist; and if they so found, they would find a verdict for the plaintiff for the sum named in the policy, with interest from the tenth day of September, 1868.”

Verdict and judgment having gone for the plaintiff, the insurance company brought the case here.

Mr. Justice MILLER delivered the opinion of the court.

The question presented in this case for consideration has been often in the courts, and the discriminations between what is total loss and what is not are frequently very nice and delicate. The authorities are by no means uniform or consistent with each other, when, as in the present case, the line of distinction is very narrow. Several cases bearing upon the one before us have been decided in this court, and perhaps a short review of them may aid us here better than a more extended examination of the numerous other authorities on the subject.

In the case of *Biays v. Chesapeake Ins. Co.* (7 Cranch, 415), the plaintiff was insured upon hides, the whole number of

which was 14,565. Of these, 789 were totally lost by the sinking of a lighter, and 2,491 of those sunk were fished up in a damaged condition and sold. The hides were memorandum articles, and this court held that inasmuch as less than 800 hides insured as part of a much larger number of the same kind was lost, it could not be a total loss, and overruled the argument that it was a total loss as to the 789 hides.

In the case of *Marcardier v. Chesapeake Ins. Co.* (8 Id. 47), it is said that "it seems to be the settled doctrine that nothing short of a total extinction either physical or in value of memorandum articles at an intermediate port would entitle the insured to term the case a total loss, where the voyage is capable of being performed. And perhaps even as to an extinction in value, where the commodity *specifically* remains, it may yet be deemed not quite settled whether, under like circumstances, it would authorize an abandonment for a total loss."

In the case of *Morean v. The United States Ins. Co.* (1 Wheaton, 219), more than half of a cargo of corn was thrown overboard and lost. The remainder was saved in a damaged condition, and sold at about one-fourth the market value of sound corn. This was held not to be a total loss, because part of the corn was saved, and though damaged was of some value. It was therefore, only a partial loss.

The next case is that of *Hugg v. The Augusta Insurance Co.*, 7 Howard, 595. The question there arose on an insurance of jerked beef of four hundred tons, part of which was thrown into the sea and part of the remainder so seriously damaged that the authorities of the city of Nassau refused to allow more than 150 of it to be landed. This was wet and heated, and not in a condition for reshipment. In answer to a question on this subject, certified to this court by the judges of the circuit court, it was replied, "that if the jury found that the jerked beef was a perishable article within the meaning of the policy, the defendant is not liable as for a total loss of the freight, unless it appears that there was a destruction in *specie* of the entire cargo so that it had lost its original character at Nassau, or that a total destruction would have been inevitable from the damage received if it had been reshipped before it could have arrived at Matanzas, the port of destination." And though there are

some very strong expressions of the judge who delivered the opinion as to the necessity of the total destruction of the thing insured to establish a total loss in memorandum articles, no doubt the language here certified is the true expression of the court's opinion. And it will be observed that in this case, as in the case of *Marcardier v. Chesapeake Insurance Co.*, the destruction spoken of is destruction as to species, and not mere physical extinction. Indeed, philosophically speaking, there can be no such thing as absolute extinction. That of which the thing insured was composed must remain in its parts, though destroyed as to its specific identity. In the case of the jerked beef, for instance, it might remain as a viscid mass of putrid flesh, but it would no longer be either beef or jerked beef. And when the case went back for trial in the circuit, the charge of Taney, C. J., to the jury places this point in a very clear light. Taney's Decisions, 168. He says there was not a total loss at Nassau, because a part of the jerked beef remained in specie, and had not been destroyed by the disaster. And if there was reasonable ground for believing that a portion of this beef could, by repairing the vessel, have been transported to Matanzas, although it might arrive there in a damaged condition, but yet retaining *the character of jerked beef*, there was no total loss. The jury found there was a total loss. The case of *Judah v. Randal* (2 Caine's Cases, 324), where a carriage was insured, and all was lost but the wheels, is another illustration of the principle. A part of the carriage—namely, the wheels—a very important part, was saved; but the court held that the thing insured—to wit, the carriage—was lost; that it was a total loss. Its specific character as a carriage was gone.

In the case of *Wallerstein v. The Columbian Insurance Co.* (44 N. Y. 204), the whole doctrine is ably reviewed with a very full reference to previous decisions; and it is there shown that there is far from unanimity in the language in which the rule is expressed, and the extreme doctrine of an absolute extinction or destruction of the thing insured is not the true doctrine, or, at least, is not applicable in all cases as a criterion of total loss.

The circuit court was right in holding that what was insured was machinery—pieces or parts of a machine—pieces made and shaped to unite at points with other pieces so as to

make a sugar-packing machine. If parts of them were absolutely lost, and every piece recovered had lost its adaptability to be used as part of the machine—had lost it so entirely that it would cost as much to buy a new piece just like it as to repair or adapt that one to the purpose—then there was a total loss of the machinery. If no piece recovered was of any use, or could be applied to any use connected with the machine of which it was a part, without more expense on it than its original cost, then there was no part of the *machinery* saved, however much of rusty iron may have been taken from the wreck. The court went quite as far in behalf of the defendant as the law justified, when it told the jury that the plaintiff could not recover if any piece or portion of the machinery insured arrived at its destination in a condition so perfect that it could have been used with its corresponding or connecting pieces, had they also arrived in good condition.

We are of the opinion that the charge of the court put the case very fairly to the jury, as we understand the law, and the judgment is, therefore,

Affirmed.

APPENDIX.

STATUTES AND FORMS.

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CHAPTER I.

STATUTES GOVERNING THE CONTRACT.¹

I.

Civil Codes.

THE following States have adopted civil codes which treat of the subject of insurance law with some detail.

California, Deering's Codes and Statutes, 1885.	Idaho, Rev. Stat. 1887.
Dakota, Compiled Laws, 1887.	North Dakota. See Dakota.
Georgia, Code, 1882.	Oklahoma, Com. Stat. 1891.
	South Dakota. See Dakota.

II.

Agency.

The following States have adopted laws providing that the soliciting agent shall be deemed the agent of the insurer.

The Connecticut statute is given as a specimen :

“Whoever solicits, procures, or receives in, or transmits from, the State any application other than his own for membership or insurance in any corporation or association embraced by section 2892, shall be deemed and held to be an agent of such corporation or association within the meaning of this chapter.”

Arizona, R. S. 1887, § 260.	Iowa, McClain's Code, 1888, § 1732
Connecticut, Gen. Stat. 1888, §§ 2898, 2923.	(L. 1880, ch. 211, § 1).
Delaware, Laws, 1875, ch. 179.	Kentucky, Pub. Acts, 1885-86, ch. 697, § 1 ; Pub. Acts, 1883-4, ch. 871, § 7 (Foreign Co.'s).
Georgia, Laws, 1887, p. 121, § 9.	Maine, R. S. 1883, p. 445, § 19.
Illinois, R. S. 1891 (Cothran), p. 840, § 58.	

¹ In addition to the tables of statutes relating to the contract of insurance, I have also, for convenience, appended lists of references to retaliatory and anti-compact laws.

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| Massachusetts, Acts, 1887, ch. 214, § 87. | Pennsylvania, Brightly's Purdon's Digest, 1883, vol. 1, p. 919, § 82. |
| Mississippi, Code, 1880, § 1085. | Rhode Island, Pub. Laws, Jan. 1884, p. 55, § 7. Pub. Laws, Jan. 1885, p. 63, § 1. |
| Missouri, R. S. 1889, § 5915. | South Carolina, Laws, 1883, p. 460, § 6. |
| Nebraska, Comp. Stat. 1891, ch. 16, § 8. | Tennessee, Acts, 1887, ch. 187, § 6. |
| New Hampshire, Laws, 1889, ch. 94, § 2. | Texas, Sayle's Civil Stat. 1888, vol. 2, § 2943a. |
| New Mexico, Comp. Laws, 1884, § 1479. | Vermont, Rev. Laws, 1880, § 3620. |
| North Dakota, Laws, 1891, p. 203, § 28. | Virginia, Acts, 1887, ch. 271, § 5. |
| Ohio, R. S. 1890 (Smith & Ben.), § 3644. | Wisconsin, Sanborn & B.'s Annot. Stat. 1889, vol. 1, § 1977. |
| Oklahoma, Stat. 1890, p. 637, § 23. | |

III.

Annexation of Application to Policy.

The following States have adopted laws requiring the annexation of applications to policies.

The Ohio statute is given as a specimen :

“Every company doing business in this State shall return with and as part of any policy issued by it, to any person taking such policy, a full and complete copy of each application or other document held by it which is intended in any manner to affect the force or validity of such policy, and any company which neglects so to do shall, so long as it is in default for such copy, be estopped from denying the truth of any such application or other document; and in case such company neglect, for thirty days after demand made therefor, to furnish such copies, it shall be forever barred from setting up, as a defense to any suit on such policy, any incorrectness or want of truth of such application or other document.”

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| California. See Deering's Civil Code, § 2605. | Ohio, R. S. 1890, vol. 1, § 3623. |
| Iowa, McClain's Stat. 1888, § 1733. | Oklahoma, Stat. 1890, § 3155. |
| Kansas, Gen. Stat. 1889, vol. 1, § 3437. | Pennsylvania, Brightly's Purdon's Digest, vol. 1, p. 924, § 108. |
| Massachusetts, Acts, 1890, ch. 421, § 21. | Wisconsin, Sanborn & B.'s Annot. Stat. 1889, vol. 1, § 1945a. |

IV.

Provisions of Application or By-Laws to be set forth in Policy.

The following States have adopted laws providing that conditions are not valid or provisions of application or by-laws are not binding unless set forth in the policy.

The Pennsylvania statute is given as a specimen :

“All life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this State, or by foreign corporations doing business therein, which contain any reference to the application of the insured, or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application, as signed by the applicant, and the by-laws referred to; and unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence, in any controversy between the parties to, or interested in, the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties.”

Connecticut, Gen. Stat. 1888, § 2826.	Massachusetts, Acts, 1887, ch. 214,
Kansas, Gen. Stat. 1889, vol. 1, § 3437.	§ 59.
Maine, R. S. 1883, ch. 49, § 24.	Pennsylvania, Brightly's Purdon's Digest, 1883, vol. 1, p. 924, § 108.

V.

Technical Forfeitures.

The following States have adopted laws providing that misrepresentations and other breaches of policy shall not avoid unless in matters material to the risk.

The Massachusetts statute is given as a specimen :

“No oral or written misrepresentation made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss.”

Georgia. See Code, 1882, §§ 2803–2804.	Missouri, R. S. 1889, § 5849.
Kentucky, Gen. Stat. 1887, p. 308.	New Hampshire, Laws, 1885, ch. 73.
Maine, R. S. 1883, p. 445, § 20.	Ohio, R. S. 1890, § 3625.
Massachusetts, Acts, 1887, ch. 214, § 21.	Pennsylvania, Laws, 1885, p. 134, § 1.

VI.

By-Laws to Govern Claims under Policies.

Dakota has enacted :

“The corporation shall in and by its by-laws provide for the manner in which such insurance shall be effected and the terms and conditions

thereof, the time and manner in which losses by it sustained under its policy of insurance shall be determined, proved, adjusted and paid, the time and manner in which assessments shall be made upon its members for their respective pro rata share of such losses, and the time, manner and place in which and the person to whom such assessment shall be paid; it shall also in and by its by-laws provide such other regulations, terms and conditions as may be necessary for effectively and fully carrying out its scheme of insurance; and the said by-laws in force at the time of the date of any policy of insurance issued by the corporation shall have the force and effect of law in the determination of all questions and claims arising under such policy between the holder thereof and the said corporation."

Laws of Dakota, 1889, ch. 69, Art. 10.

VII.

Corporate Seal not Required on Policy.

The following States have adopted laws providing that policies of insurance not executed over the corporate seal of the company are nevertheless binding.

The Pennsylvania statute is given as a specimen :

"Policies of insurance made or entered into by the company may be made either with or without the seal thereof, and they shall be subscribed by the president or such other officer as may be designated by the directors for that purpose, and attested by the secretary; and when so subscribed and attested, shall be obligatory on the company."

Arizona, R. S. 1887, § 253.

Colorado, 1 Mills Stat. 1891, § 2227.

Idaho, R. S. 1887, § 2742.

Kansas, Gen. Stat. 1889, vol. 1, § 3347.

Maine, R. S. 1883, ch. 49, § 12.

Montana, R. S. 1887, p. 772, § 575.

Nebraska, Comp. Stat. 1891, ch. 43, § 12.

New Mexico, Comp. Laws, 1884, § 1465.

Ohio, R. S. 1890, vol. 1, § 3645.

Pennsylvania, Brightly's Purdon's Digest, 1883, vol. 1, p. 913, § 46.

Washington, Code, 1891, § 2739.

Wyoming, R. S. 1887, § 614.

VIII.

Limitation of Time for Suit.

The following States have adopted laws forbidding certain limitations of time for bringing suit.

The Massachusetts statute is given as a specimen :

"No such company shall make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit thereon may be brought, nor shall limit the time within which such suit

may be commenced to less than two years after the cause of action accrues, and any such condition or stipulation shall be void."

Connecticut, Gen. Stat. 1888, § 2912.	Massachusetts, Acts, 1887, ch. 214,
Indiana, R. S. 1888, vol. 2, § 3770.	§ 26.
Kentucky, Public Acts, 1873-4, ch. 186, § 1 (Gen. St. 1887, p. 308).	North Carolina, Code, 1883, vol. 2, § 3076. Laws, 1883, ch. 57, § 16.
Maine, R. S. 1883, ch. 49, § 87.	Vermont, Rev. Laws, 1880, § 3626.

FIRE INSURANCE.

IX.

Standard Policy.

The following States have passed statutes for the adoption of a standard form of fire policy:

Massachusetts, Acts, 1887, ch. 214, § 60.	93, § 3. (Standard form not yet adopted.)
Michigan, Pub. Stat. 1882, §§ 4344-4353. Amended by Pub. Acts, 1889, ch. 39, § 9.	New York, 3 R. S. 8th ed., p. 1663. Laws, 1886, ch. 488.
Minnesota, Stat. 1891, vol. 1, §§ 2973-2977. Also Gen. Laws, 1889, ch. 217.	North Dakota, Laws, 1890, p. 253, ch. 74.
New Hampshire, Laws, 1885, ch.	Pennsylvania, Laws, 1891, p. 22, § 1. (To go into effect May 1, 1892.)
	Wisconsin, Laws, 1891, vol. 1, ch. 195.

X.

Valued Policy.

The following States have adopted valued policy laws.

The Wisconsin statute is given as a specimen:

"Whenever any policy of insurance shall be written to insure real property, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed."

Arkansas, Laws, 1889, p. 57, ch. 42.	Missouri, R. S. 1889, vol. 2, § 5897,
Dakota. See Comp. Laws, 1887, § 4151, 4243.	5898.
Delaware, Laws, 1889, ch. 695.	Nebraska, Comp. Stat. 1891, ch. 43, § 43 (Laws, 1889, ch. 48, § 1).
Iowa, McClain's Stat. 1888, § 1734 (L. 1880, ch. 211, § 3).	New Hampshire, Laws, 1885, ch. 93, § 2.

North Dakota. See Dakota.

South Dakota. See Dakota.

Ohio, R. S. 1890, § 3643.

Texas, Sayles' Civil Stat. 1888, vol.

Oklahoma, Stat. 1890, p. 631, §§4 and 32.

2, § 2971.

Wisconsin, Sanborn & B. Annot.

Pennsylvania, Laws, 1887, p. 186 (Boiler Ins.).

Stat. 1889, vol. 1, § 1943.

XI.

Notice of Loss.

The following States have adopted laws forbidding the insertion of conditions requiring notice of loss within less than five days and the presentation of certificates of nearest magistrate.

The Indiana statute is given as a specimen :

“No such insurance company shall insert any condition, in any policy hereafter issued, requiring the insured to give notice forthwith, or within the period of time less than five days, of the loss of the insured property; nor shall any condition be inserted in such policy, requiring the insured to procure the certificate of the nearest Justice of the Peace, Mayor, Judge, clergyman, or other official, or person, of such loss, or the amount of such loss; and any provision or condition contrary to the provisions of this section, or any condition in said policy, inserted to avoid the provisions of this section, shall be void, and no condition or agreement, not to sue for a period of less than three years, shall be valid.”

Indiana, R. S. 1888, vol. 2, § 3770.

Maine, R. S. 1883, p. 446, § 21.

XII.

Cancellation of Policy.

The following States have adopted laws providing that no company shall cancel a fire insurance policy without notice first given and unearned part of premium returned.

The Connecticut statute is given as a specimen :

“No insurance company or association shall cancel a policy issued against loss by fire on property in this State, without giving the party insured at least five days' notice, in writing, of such intention, and a return of the ratable proportion of the premium for the unexpired term of the policy.”

Connecticut, Gen. Stat. 1888, § 2852.

Michigan, Public Acts, 1887, ch. 305,

Dakota, Compiled Laws, 1887, § 3104.

§ 17.-

Kansas, Gen. Stat. 1889, vol. 1, § 3435.

North Dakota. See Dakota.

South Dakota. See Dakota.

XIII.

Privilege of Insured to Cancel Policy.

The following States have adopted laws providing that the insured shall have the privilege of insisting on the cancellation of the policy at any time.

The New York statute is given as a specimen :

"Any person, company, association or corporation transacting the business of fire, or fire and inland navigation insurance in this State, shall cancel any policy of insurance hereafter issued or renewed at any time, by request of the party insured or his legal representatives, and shall return to said party or his representatives as aforesaid the amount of premium paid, less the customary short-rate premium for the expired time of the full term for which said policy has been issued or renewed, anything in the policy to the contrary notwithstanding; provided, however, that, where the laws of any State permit companies organized under its laws to cancel policies of insurance upon different terms than above set forth, companies organized under the laws of this State may cancel policies upon risks in any such State upon the same terms as are provided for companies organized under its laws."

California, Deering's Civil Code,	Nebraska, Comp. Stat. 1891, ch. 43,
§ 2617, et seq.	§ 42.
Colorado, 1 Mill's Stat. 1891, § 2234.	New York, R. S., 8th ed., vol. 3, p.
Dakota, Compiled Laws, 1887, §	1661, § 3.
3103.	North Dakota. See Dakota.
Iowa, McClain's Stat. 1888, §§ 1724,	Ohio, R. S. 1890, vol. 1, § 3664, et
1731.	seq.
Kansas, Gen. Stat. 1889, vol. 1,	Oklahoma. See Stat. 1890, § 3112.
§ 3435.	South Dakota. See Dakota.
Michigan, Public Acts, 1887, ch. 305,	Wisconsin, Sanborn & B. Annot.
§ 17.	Stat. 1889, vol. 1, § 1946, d.

XIV.

Return of Unearned Premiums.

The following States have adopted laws providing that fire insurance companies in case of total loss shall return the unearned premium where the loss is less than the amount of the policy.

The Washington statute is given as a specimen :

"In the event of the total destruction of any insured building, on which the amount of the appraised or agreed loss shall be less than the total amount insured thereon, the insurance company or companies shall return to the insured the unearned premium for the excess of insurance

over the appraised or agreed loss, to be paid at the same time and in the same manner as the loss shall be paid."

Idaho, R. S. 1887, § 2759.

Louisiana, Acts, 1888, No. 149.

Nevada, Gen. Stat. 1885, § 993.

Oregon, Hill's Annot. Stat. 1887, vol. 2, § 3585.

Washington, Hill's Stat. 1891, vol. 1, § 2740.

LIFE INSURANCE.

XV.

Protection of Wife and Children.

* The following States have adopted laws protecting beneficiaries, if wife and children, against creditors and acts of the insured.

The New York statute is given as a specimen :

"It shall be lawful for any married woman, by herself and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and, in case of her surviving such period or term, the sum or net amount of the insurance becoming due and payable, by the terms of the insurance, shall be payable to her to and for her own use, free from the claims of the representatives of the husband, or of any of his creditors, or any party or parties claiming by, through or under him. But when the premium paid in any year out of the property or funds of the husband shall exceed five hundred dollars, such exemption from such claims shall not apply to so much of said premium so paid as shall be in excess of five hundred dollars, but such excess, with the interest thereon, shall inure to the benefit of his creditors."

Alabama, Code, 1886, vol. 1, § 2356.

Connecticut, Gen. Stat. 1888, § 2799.

Delaware, Rev. Code, 1874, ch. 76, § 3.

Florida, McClellan's Digest, 1881, p. 534, § 22.

Illinois, R. S. 1891, p. 839, § 54.

Kansas, Gen. Stat. 1889, vol. 1, § 3401.

Kentucky, Public Acts, 1869-70, ch. 645, §§ 30-31.

Maryland, Code, Pub. Gen. Laws, 1888, vol. 1, p. 321, § 117, and p. 803, §§ 8-10.

Michigan, Gen. Stat. 1882, §§ 4238, 6300, 6301.

Missouri, R. S. 1889, §§ 5851-5854.

New Hampshire, Gen. Laws, 1878, ch. 175, § 1.

New York, R. S., 8th ed., vol. 4, pp. 2602-3.

Ohio, R. S. 1890, vol. 1, §§ 3628-3829.

Oklahoma, Stat. 1890, p. 636, § 19.

Pennsylvania, Brightly's Purdon's Digest, 1883, vol. 1, p. 914, § 54.

Rhode Island, Pub. Stat. 1882, chap. 166, § 21.

- South Carolina, Gen. Stat. 1882, § 1358.
 South Dakota, Laws, 1890, ch. 86, § 4.
 Tennessee, Code, 1884, §§ 3335, 3336.
 Vermont, Rev. Laws, 1880, §§ 2340-2343.
- West Virginia, Code, 1887, ch. 66, §§ 5-6 as amended by Acts, 1891, p. 325 (ch. 109).
 Wisconsin, Sanborn & B. Annot. Stat. 1889, vol. 1, § 2347. Amended by Laws, 1891, vol. 1, ch. 376.

XVI.

Protection of all Beneficiaries.

The following States have adopted laws securing to the beneficiaries in certain cases the proceeds of life insurance free from creditors, etc.

The New York statute is given as a specimen:

“The money or other benefit, charity, relief or aid to be paid, provided or rendered by any corporation, association or society authorized to do business under this act shall be exempt from execution, and shall not be liable to be seized, taken or appropriated by any legal or equitable process, to pay any debt or liability of a member.”

- California, Laws, 1891, ch. 116, § 8.
 Colorado, 1 Mills' St. 1891, § 2246.
 Iowa, McClain's Stat. 1888, § 1756 [1182]; § 3576 [2372].
 Kentucky, Public Acts, 1869-70, ch. 645, § 32.
 Maine, R. S. 1883, ch. 75, § 10; ch. 49, § 94.
 Massachusetts, Acts, 1887, ch. 214, § 73; Acts, 1888, ch. 429, § 15; Acts, 1890, ch. 421, § 23 (assessment ins.).
 Michigan, Public Acts, 1887, ch. 187, § 29.
 Minnesota, Stat. 1891, v. 1, § 3047.
 Also Gen. L. 1885, ch. 184, § 17.
- Mississippi, Code, 1880, § 1261.
 Missouri, R. S. 1889, § 5867.
 Nevada, Laws, 1891, ch. 98, § 9.
 New Hampshire, Gen. L. 1878, ch. 175, § 2.
 New York, 3 R. S., 8th ed., p. 1709, § 19 and p. 1711.
 North Dakota, Laws, 1891, ch. 73, § 18 and ch. 74, § 15.
 Pennsylvania, Brightly's Purdon's Dig. 1883, v. 1, p. 924, § 106.
 Rhode Island, Pub. Laws, Jan., 1889, p. 24, § 8.
 South Dakota, Laws, 1890, p. 130; § 22.
 Tennessee, Code, 1884, §§ 1813, 3135.
 Vermont, Rev. L. 1880, § 2345.

XVII.

Change of Beneficiary.

The following States have adopted laws providing that a member of certain life insurance societies may make a change of beneficiary without consent of former beneficiary.

The New York statute is given as a specimen :

“Membership in any corporation, association or society transacting the business of life or casualty insurance, or both, upon the co-operative or assessment plan, shall give to any member thereof the right, at any time, with the consent of such corporation, association or society, to make a change in his payee or payees, beneficiary or beneficiaries without requiring the consent of such payee or beneficiaries.”

Iowa, McClain's Code, 1888, § 1767	Michigan, Public Acts, 1887, ch. 187,
(L. 1886, ch. 65, § 7).	§ 16.
Kansas, Gen. Stat. 1889, § 3464.	New York, 3 R. S., 8th ed., p. 1709,
	§ 18.

XVIII.

Discriminations.

The following States have adopted laws prohibiting discriminations in rates by life insurance companies.

The New York statute is given as a specimen :

“Life insurance companies doing business in this State shall not make any discrimination in favor of individuals of the same class and of the same expectation of life, either in the amount of premium charged or any return of premium, dividends or other advantages, and no agent of any such insurance company shall make any contract for insurance, or agreement as to such contract of insurance, other than that which is plainly expressed in the policy issued, nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to any person to insure, any rebates of premium or any special favor or advantage whatever, in the dividends to accrue thereon, or any inducement whatever, not specified in the policy. Whenever it shall appear to the satisfaction of the superintendent of the insurance department, after a hearing held by him upon due notice, that any company is issuing policies or making contracts that are either directly or indirectly a violation of this act, he shall thereupon, with the approval of the attorney-general, in writing, require said company and its officers and agents to refrain, within twenty days, from making or delivering any such policy or contract; and the making or delivering of any such policy or contract thereafter, shall render such company or person guilty of a misdemeanor, punishable as provided in the third section of the act hereby amended. It is further made the duty of said superintendent, in case of the failure of any company or its officers or agents to comply with said requirement within the twenty days, to publish a notice of the fact in the State newspaper once a week for four weeks.”

Colorado, 1 Mills' Stat. 1891, § 2232.	Connecticut, Public Acts, 1889, ch. 134.
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Delaware, Laws, 1891, ch. 273.	Ohio, R. S. 1890, vol. 1, §§ 3631-2
Illinois, Laws, 1891, p. 148.	(p. 906).
Iowa, Laws of 1890, ch. 33.	Pennsylvania, Laws, 1889, ch. 116,
Louisiana, Acts of 1886, No. 82.	§ 1.
Maine, Public Acts, 1891, ch. 128.	Rhode Island, Public Acts, Jan. 1888,
Maryland, Laws, 1890, ch. 254.	ch. 673.
Massachusetts, Acts, 1887, ch. 214,	Vermont, Acts, 1888, p. 126.
§ 68.	West Virginia, Acts, 1891, ch. 108,
Michigan, Public Acts, 1889, No. 171,	p. 322.
§ 31.	Wisconsin, Laws, 1891, vol. 1, ch.
New York, Laws, 1889, ch. 282, § 1,	267.
as am'd by Laws, 1890, ch. 401.	Wyoming, Laws, 1890-91, ch. 101.

XIX.

Discriminations against Colored Persons.

The following States have adopted laws prohibiting discrimination against colored persons, by life insurance companies.

The New York statute is given as a specimen :

"§ 1. No life insurance company doing business within this State shall make any distinction or discrimination between white persons and colored persons, wholly or partially of African descent, as to the premiums or rates charged for policies upon the lives of such persons, or in any other manner whatever; nor shall any such company demand or require a greater premium from such colored person than is at that time required by such company from white persons of the same age, sex, general condition of health and prospect of longevity; nor shall any such company make or require any rebate, diminution or discount upon the amount to be paid on such policy in case of the death of such colored persons insured, nor insert in the policy any condition, nor make any stipulation whereby such person insured shall bind himself, or his heirs, executors, administrators and assigns to accept any sum less than the full value or amount of such policy in case of a claim accruing thereon by reason of the death of such person insured, other than such as are imposed upon white persons in similar cases; and any such stipulation or condition so made or inserted shall be void.

"§ 2. The violation of any part of the first section of this act shall be deemed a misdemeanor, and the party or parties violating the same shall, upon conviction thereof, be subject to a fine of not less than fifty dollars, or more than five hundred dollars."

Connecticut, Gen. Stat. 1888, § 2861.	New York, Laws, 1891, ch. 119.
Massachusetts, Acts, 1887, ch. 214,	Ohio, R. S. 1890, vol. 1, §§ 3631-4
§§ 69, 109.	(p. 906).

XX.

Non-forfeiture.

The following States have adopted non-forfeiture laws in life insurance.

The New York statute is given as a specimen :

“§ 1. Whenever any policy of life insurance hereafter issued by any company organized or incorporated under the laws of this State, after being in force three full years, shall by its terms lapse or become forfeited for the non-payment of any premium, or of any note given for a premium, or loan made in cash on the policy as security, or of any interest on such note or loan, unless the provisions of this act are specifically waived in the application, and notice of such waiver written or printed in red ink on the margin of the face of the policy when issued, the reserve on such policy, including dividend additions, calculated at the date of the failure to make any of the payments above described, according to the American experience table of mortality, and with interest at the rate of four and a half per cent. per annum, after deducting any indebtedness of the insured on account of any annual, semi-annual, or quarterly premium then due, and any loan made in cash on such policy, evidence of which is acknowledged by the insured in writing, shall, on demand made, with surrender of the policy within six months after such lapse, be taken as a single premium of life insurance at the published rates of the company at the time the policy was issued, and shall be applied, as shall have been agreed in the application and policy, either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of lapse, or to purchase upon the same life at the same age, paid-up insurance payable at the same time, and under the same conditions, except as to payment of premiums, as the original policy. Provided, that if no such agreement be expressed in the application or policy, the said single premium may be applied in either of the modes above specified, at the option of the owner of the policy; notice of such option to be contained in the demand hereinbefore required to be made to prevent the forfeiture of the policy. Provided, also, that the net value of the insurance given for such single premium under this section, computed by the standard of this State, shall in no case be less than two-thirds of the entire reserve after deducting the indebtedness as specified; but such insurance shall not participate in the profits of the company.

“§ 2. If the reserve upon any endowment policy, applied according to the preceding section as a single premium of temporary insurance, be more than sufficient to continue the insurance to the end of the endowment term named in the policy, and if the insured survive that term, the excess shall be paid in cash at the end of such term, on the conditions on which the original policy was issued.”

California, Deering's Civil Code, Colorado, Mills' Stat. 1891, v. 1, § 2766 n. (Stat. 1871-2, ch. 62). 2223.

- Maine, R. S. 1883, p. 460, § 91, Michigan, Gen. Stat. 1882, vol. 1, §
 amended by Pub. Laws, 1887, ch. 4232.
 71. Missouri, R. S. 1889, § 5856.
 Massachusetts, Acts, 1887, ch. 214, New York, 3 R. S., 8th ed., p.
 § 76. 1688.

Most of the other States have adopted laws which provide that no policies of insurance shall lapse unless the company shall have notified the insured of the fact that premium is due and unpaid.

XXI.

Effect of War.

Massachusetts has enacted :

"No policy of insurance issued to a citizen of the Commonwealth by an authorized company organized under the laws of a foreign country shall be invalidated by the occurrence of hostilities between such foreign country and the United States."

Mass. Acts, 1887, ch. 214, § 84.

XXII.

Suicide.

Missouri has enacted :

"In all suits upon policies of insurance on life hereafter issued by any company doing business in this State, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

Mo. R. S. 1889, vol. 2, § 5855.

XXIII.

Retaliatory Laws.

The following States have adopted retaliatory laws.

The New York statute is given as a specimen :

"Whenever the existing or future laws of any other State of the United States shall require of insurance companies, incorporated by or organized under the laws of this State, and having agencies in such other States, or of the agents thereof, any deposit of securities in such State for the protection of policy-holders, or otherwise, or any payment for taxes, fines, penalties, certificates of authority, license fees, or otherwise, greater than the amount required for such purposes from similar companies of other States by the then existing laws of this State, then, and in every such case, all companies of such States establishing or having heretofore established an agency or agencies in the State, shall be and are hereby required to make the same deposit for a like purpose in the insurance

department of the State, and to pay the superintendent of said department for taxes, fines, penalties, certificates of authority, license fees and otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such State upon the companies of this State and the agents thereof. And the superintendent of the insurance department is hereby authorized to remit any of the fees and charges which he is required to collect by existing laws, except such as he is required to collect under and by virtue of this act, provided, however, that no discrimination shall be made in favor of one company over any other from the same State."

- Connecticut, Gen. Stat. 1888, § 2913; amended Pub. Laws, 1889, ch. 95; see also Gen. Stat. 1888, § 2835.
- Georgia, Laws, 1887, p. 124, § 12.
- Illinois, R. S. 1891 (Cothran), p. 830, § 29; p. 839, § 55, and p. 840g, § 63w.
- Indiana, Acts, 1889, ch. 169, § 2.
- Iowa, McClain's Code, 1888, § 1717 (1154).
- Kansas, Gen. Stat. 1889, vol. 1, § 3330.
- Kentucky, Public Acts, 1869-70, ch. 645, § 47.
- Maine, Pub. Acts, 1889, ch. 237, § 12.
- Maryland, Code, Pub. Gen. Laws, 1888, vol. 1, p. 340, § 138.
- Massachusetts, Acts, 1885, ch. 183, § 9; Acts, 1887, ch. 214, § 85.
- Michigan, Gen. Stat. 1882, vol. 1, § 4243; Public Acts, 1887, ch. 187, § 17.
- Minnesota, Stat. 1891, vol. 1, § 2907.
- Missouri, R. S. 1839, § 5932.
- Montana, Comp. Stat. 1887, p. 782, § 596.
- Nebraska, Comp. Stat. 1891, ch. 43, § 33.
- Nevada, Laws, 1891, ch. 98, § 7.
- New Hampshire, Laws, 1890-91, ch. 54.
- New Jersey, Revision, 1877, p. 508, § 10.
- New Mexico, Comp. Laws, 1884, § 1486.
- New York, 3 R. S. 8th ed., p. 1617.
- North Dakota, Laws, 1891, p. 209, § 11.
- Ohio, R. S. 1890, § 282.
- Oklahoma, Stat. 1890, p. 630, § 29; p. 636, § 20.
- Pennsylvania, Laws, 1887, p. 335, § 1.
- Rhode Island, Pub. Stat. 1882, ch. 156, § 23.
- South Dakota, Laws, 1890, p. 131, § 27.
- Tennessee, Code, 1884, § 2580; Acts, 1891, ch. 47, § 10.
- Texas, Sayles' Civil Stat. 1888, vol. 2, § 2948.
- Vermont, Rev. Laws, 1880, § 3627; Laws, 1888, p. 125.
- Virginia, Code, 1887, § 1279.
- West Virginia, Acts, 1891, p. 323.
- Wisconsin, Sanborn & B. Annot. Stat. 1889, vol. 1, § 1221.
- Wyoming, R. S. 1887, § 635.

XXIV.

Anti-Compact Laws.

The following States have adopted anti-compact laws.

The New Hampshire statute is given as a specimen:

"Should any insurance company not organized under the laws, but

doing an insurance business within this State, make an application to remove any suit or action to which it is a party, heretofore or hereafter commenced in any court of this State, to the United States District or Circuit Court, or shall enter into any compact or combination with other insurance companies for the purpose of governing or controlling the rates charged for fire insurance on any property within this State, the insurance commissioner shall forthwith revoke the license or authority of said company to transact business, and no renewal of said license or authority shall be granted for the period of three years from the date of such revocation."

Missouri, R. S. 1889, ch. 128, §§ New Hampshire, Laws, 1885, ch. 93,
7319-7326. § 1.

CHAPTER II.

I.

Standard Form of Fire Insurance Policy for New York State.

THE Insurance Company, in consideration of the stipulation herein named and of dollars premium, does insure for the term of from the day of, 189.., at noon to the day of, 189.., at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit:—

(Description of property insured.)

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimation shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement inducting

hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosi-

ties, drawings, dies, implements, jewels, manuscripts, medals, models patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

7 If an application, survey, plan, or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured.

7 In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company.

7 This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

7 This policy shall be canceled at any time at the request of the insured or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

7 If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

7 If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

7 If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage

forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

— The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

— In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss; stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire.

— This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

— This company shall not be liable under this policy for a greater propor-

tion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment. § 167 on "*proximate loss*".

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured; and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulation shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

IN WITNESS WHEREOF, this company has executed and attested these presents, this day of 189...

II.

A Form of Mortgage Clause.

Loss or damage, if any, under this policy, shall be payable to as mortgagee [or trustee], as interest may appear, and this insurance, as to the interest of the mortgagee [or trustee] only therein, shall not be

invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; PROVIDED, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee [or trustee] shall, on demand, pay the same.

PROVIDED also, that the mortgagee [or trustee] shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee [or trustee] and, unless permitted by this policy, it shall be noted thereon, and the mortgagee [or trustee] shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee [or trustee] for ten days after notice to the mortgagee [or trustee] of such cancellation and shall then cease, and this company shall have the right, on like notice, to cancel this agreement.

Whenever this company shall pay the mortgagee [or trustee] any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee [or trustee] the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee [or trustee] to recover the full amount of his claim.

III.

A Form of Co-Insurance Clause.

If at the time of fire the whole amount of insurance on the property covered by this policy shall be less than the actual cash value thereof, this company shall, in case of loss or damage, be liable for such portion only of the loss or damage as the amount insured by this policy shall bear to the actual cash value of such property.

IV.

A Form of Percentage Co-Insurance and Limitation Clause.

If at the time of fire the whole amount of insurance on the property covered by this policy shall be less than per cent. of the actual cash value thereof, this company shall in case of loss or damage be liable

for such portion only of the loss or damage as the amount insured by this policy shall bear to the said per cent. of the actual cash value of such property; *Provided*, that in case the whole insurance shall exceed per cent. of the actual cash value of the property covered by this policy, this company shall not be liable to pay more than its pro rata share of said per cent. of the actual cash value of such property; and should the whole insurance at the time of fire exceed the said per cent., a pro rata return of premium on such excess of insurance from the time of the fire to the expiration of this policy shall be made on surrender of the policy.

V.

A Form of Average Clause.

It is understood and agreed, that the amount insured by this policy shall attach in each of the above named premises, in that proportion of the amount hereby insured, that the value of property covered by this policy, contained in each of said places, shall bear to the value of such property contained in all of above named premises.

VI.

A Form of Open Policy.

The Insurance Company, in consideration of the stipulation herein named and of the several sums to be specified and indorsed hereon, does insure for such time as may be specified hereon from the day of commencement, at noon, to the day of termination, at noon, against all direct loss or damages by fire, except as hereinafter provided, to an amount not exceeding the sum or sums insured, as specified and indorsed hereon, to the following described property while located and contained as described herein, and not elsewhere, to wit :

On goods, wares, merchandise, produce, or other property, hazardous, not hazardous, or extra hazardous (according to the classification of the New York Board of Fire Underwriters) his own, or held by him in trust, or on commission, or sold, but not delivered, as shall be specified and indorsed hereon by this company and for such amounts, in such storehouses and places, and at such rates of premium as shall be approved and so indorsed hereon, or in a book attached hereto, by one of the officers of this company, or by the duly authorized agent at

(The conditions are those of the standard form.)

VII.

Floating Policy.

(Form of description of property insured):

A

On merchandise, hazardous, not hazardous, and extra hazardous, his

own, or held by him in trust or on commission, or on joint account with others, or sold, but not delivered, in all or any of the brick or stone warehouses, and while in transitu, in or on any of the streets, yards or wharves, in the cities of New York, Brooklyn, Jersey City and Hoboken, and unless under the protection of a marine policy in any ship or vessel in the ports of said cities—subject to the following conditions of average.

It is hereby declared and agreed that in case the property aforesaid in all the buildings, places, or limits, included in this insurance, shall, at the breaking out of any fire or fires, be collectively of greater value than the sum insured, then this company shall pay and make good such a portion only of the loss or damage as the sum insured shall bear to the whole value of the property aforesaid, at the time when such fire or fires shall first happen.

But it is at the same time declared and agreed, that if any specific parcel of goods included in the terms of this policy, or such goods in any specified building or buildings, place or places, within the limits of this insurance, shall at the time of any fire be insured in this or any other office, this policy shall not extend to cover the same, excepting only as far as relates to any excess of value beyond the amount of such specific insurance or insurances, and shall not be liable for any loss unless the amount of such loss shall exceed the amount of such specific insurance or insurances, which said excess only is declared to be under the protection of this policy and subject to average as aforesaid.

It being the true intent and meaning of this agreement, that this company shall not be liable for any loss, unless the amount of such loss shall exceed the amount of the specific insurance or insurances, and then only for such excess, which said excess shall be subject to average as above.

This policy does not cover in Hudson River Railroad stores, in any tobacco inspection or other tobacco warehouse, or in any grain elevator or elevator store in New York City, Brooklyn, Jersey City or Hoboken.

(Another form of description):

B

On merchandise, hazardous, not hazardous, and extra hazardous, his own, or held by him in trust or on commission, or on joint account with others, or sold but not delivered, in all or any of the brick or stone warehouses, and while in transitu, in or on any of the streets, yards or wharves, in the cities of New York, Brooklyn, Jersey City and Hoboken, and unless under the protection of a marine policy in any ship or vessel in the ports of said cities—subject to the following conditions of average.

It is hereby declared and agreed that in case the property aforesaid in all the buildings, places, or limits, included in this insurance, shall, at the breaking out of any fire or fires, be collectively of greater value than the sum insured, then this company shall pay and make good such a portion only of the loss or damage as the sum insured shall bear to the whole value of the property aforesaid, at the time when such fire or fires shall first happen.

It is further declared and agreed, that goods in stores, warehouses, and other places, in which the assured has specific insurance or insurances, are not covered in whole or in part by this policy; and that the same is not intended to attach to such goods in whole or in part.

This policy does not cover in Hudson River Railroad Stores, in any tobacco inspection or other tobacco warehouse, or in any grain elevator or elevator store in New York City, Brooklyn, Jersey City or Hoboken.

VIII.

Form of Clause for Insurance of Rent.

\$., the rents of the story roofed building, while occupied as and situate

Subject to the following conditions:

It is understood and agreed, that in case the above-named building or any part thereof being occupied shall be rendered untenable by fire, so as to cause to the assured an actual loss of rents, this company shall be liable for such loss of rent ensuing therefrom, not exceeding the sum insured.

The assured hereby agrees to rebuild or repair the premises in as short a time as the nature of the case will admit; but if for any reason this shall not be done, the limit of time required for the purpose to be determined, if necessary, by estimates of competent builders obtained by the company and by the assured. Loss to be computed from the date of the occurrence of said fire, not being limited by day of expiration named in policy, as to fire occurring before such expiration, and cease on said building being rendered tenantable. And the sum insured will be taken as the yearly rent of the premises, and this company shall be liable only for such proportion of any loss as the sum hereby insured bears to the actual annual rent of the building.

It is understood that the rental value of that portion of the above described premises occupied by the assured or employees is covered by this policy.

IX.

Form of Clause for Insurance of Use and Occupancy.

On the use and occupancy of his mill buildings, situate at

It is a condition of this contract of insurance that, if the said buildings or machinery therein, or either of them, or any part thereof, shall be destroyed, or so damaged by fire occurring during the continuance of this policy that the mill is entirely prevented from producing goods, this company shall be liable at the rate of dollars per day for each working day of such prevention, and in case the buildings, or machinery, or any part thereof, are so damaged as to prevent the making of a full daily average production of goods, this company is to be liable per day

for that proportion of dollars which the product so prevented from being made bears to the average daily yield previous to the fire, which, for the purpose of this insurance is agreed to be the average daily production of goods based upon the time said mill was running for one year previous to the fire, not exceeding in either case the amount insured. Loss to be computed from the day of the occurrence of any fire to the time when the mill could with ordinary diligence and dispatch be repaired or rebuilt, and machinery be replaced therein, and not to be limited by the day of expiration named in the policy.

X.

Form of Proofs of Loss.

STATE OF, }
COUNTY OF } ss. ,

BE IT KNOWN, That on this day of, 189., before me,, a Notary Public duly commissioned and sworn, and residing in the County and State aforesaid, personally appeared, who, being duly sworn, says that the following statement and the papers therein referred to and signed with his own hand contain a particular, just and true account of his loss in the words and figures following, to wit:

I. That on the day of, 189., the Insurance Company by their *Policy of Insurance*, numbered, did insure the party herein and therein named against loss or damage by fire to the amount of dollars on (description of property insured from the policy) for the term of from the day of, 189., to the day of, 189., at noon.

II. That in addition to the amount covered by said policy of said company, there was other insurance made thereon to the amount of dollars, as specified in the following schedule, besides which there was no other insurance thereon. (List of policies covering any of the property, showing as to each policy its date, term, and amount, the name of the company, and a copy of the description and schedule of property insured contained in such policy.)

III. That the property insured belonged to (statement of interest of insured and of all others in the property and of all incumbrances thereon and changes of title, etc., since the issuing of the policy).

IV. That the building insured or containing the property destroyed or damaged, was occupied at the time of fire in its several parts by the parties hereinafter named, and for the following purposes, to wit: (List of tenants.)

V. That the actual cash value of the property so insured amounted to the sum of dollars at the time immediately preceding the fire, as set forth in the following schedule:

That on the day of, 189., a fire occurred by which the property insured was injured or destroyed to the amount of

dollars, as set forth in the following schedule which the deponent declares to be a just, true and faithful account of his loss as far as he has been able to ascertain the same:

(Schedule of property damaged or destroyed, showing the cash value of each item thereof and the amount of loss thereon.) And the insured claims of the Insurance Company the sum of dollars.

(If there are subdivisions in policy, also a statement of the amount claimed under each subdivision.)

VI. That the fire originated (statement of knowledge and belief of insured as to the time and origin of the fire), and the said deponent further declares that the said fire did not originate by any act, design or procurement on his part, or in consequence of any fraud or evil practice done or suffered by him, and that nothing has been done by or with his privity or consent to violate the conditions of insurance or render void the Policy aforesaid.

.....

(insured.)

Sworn to before me this }
day of, 188... }

.....,

Notary Public.

XI.

Form of Application for Life Insurance.

I hereby apply for an assurance of \$ on the premiums payable with the Life Insurance Company, the life of, born at, on, 18 .., at present for years resident of I hereby warrant that he is intemperate in the use of stimulants or narcotics. I agree that the answers given herewith to the questions of the Agent and Examiner, which I declare and warrant to be true, shall be the basis of my contract with the company and that such contract shall at all times and places be held and construed to have been made in the City of I also agree that if within years from this date, the Insured shall, without the written consent of the company, reside or travel elsewhere than in or to the United States, Canada, or Europe; or shall within such period and without such consent be personally engaged in blasting, mining, submarine operations, or in the making of explosives, or in service on any railway train, or on a steam sailing vessel, or in naval or army service in times of war; the policy hereon applied for shall thereupon cease and determine.

Dated at this day of, 189...

WITNESS

SIGNATURE

Questions to be asked by the Agent, and answered by the person insured:

1. A What is your full name? B Are you married?

2. What is your occupation? (Give kind of business and position held.)
3. Are you in good health?
4. A For whose benefit is the proposed insurance? B How related to you?
5. What is the total insurance now on your life?
6. In what companies and for what amounts?
7. Have you any application for insurance now pending? In what companies?
8. A Have you ever applied to any agent or sought insurance in any company which either postponed or refused to issue a Policy? B State companies and cause.
9. Are you engaged in or connected with the manufacture or sale of Malt or Spirituous Liquors?

The answers to the following questions must be written by one of the Company's Examiners:

10. Have you now any disease or disorder? If so, what?
11. A For what have you sought medical advice during the past seven years? B Dates? c Duration? d Physicians consulted?
12. A Have you had any personal injury or accident? B What? c When? d Result?
13. A Have you had Rheumatism? B Number of attacks? c Dates? d Duration? e Severity?
14. A Are you or have you been subject to Dyspepsia? B Dates? c Duration? d Severity?
15. Have you ever had any of the following?

Calculus or gravel,	Dizziness or short breath,
Difficulty in urinating,	Pneumonia,
Swelling of feet or face,	Diabetes,
Dropsy,	Delirium Tremens,
Palpitation,	Vertigo,
Disease of heart or brain,	Insanity,
Loss of consciousness,	Liver complaint,
Habitual or chronic cough,	Jaundice,
Consumption,	Colic,
Bronchitis,	Dysentery,
Asthma,	Diarrhoea (chronic),
Spitting of blood,	Disease of spine,
Bleeding piles,	Gout,
Pleurisy,	Tumors of any kind,
Varicose veins,	Swelling of glands,
Paralysis or palsy,	Ulcers or open sores,
Apoplexy,	Fistula,
Nervous exhaustion,	Discharge from the ear,
Fits,	Rupture,
Sunstroke,	Difficulty in swallowing,

16. Family record.

	Age.	Condition of Health.
Is your father living ?
Is your mother living ?
How many brothers living ?	}
(If none, so state.)
How many sisters living ?	}
(If none, so state.)
Father's father living ?
Father's mother living ?
Mother's father living ?
Mother's mother living ?

	Age.	Disease which Caused Death.	Duration.	Previous Health.
Is your father dead ?
Is your mother dead ?
How many brothers dead ?	}
(If none, so state.)
How many sisters dead ?	}
(If none, so state.)
Father's father dead ?
Father's mother dead ?
Mother's father dead ?
Mother's mother dead ?

17. Have any two members of the family, grandparents included, had consumption, cancer, paralysis or apoplexy, disease of heart, disease of kidneys ?

Signed this day of , 189 . . .
(Party to be insured sign here)

XII.

A Form of Policy of Life Insurance.

This policy witnesseth that the Life Insurance Company, in consideration of the statements and agreements in the application for this

Policy, which are hereby made a part of this contract and of the sum of dollars to it in hand paid by and of the annual premium of dollars to be paid at or before twelve o'clock, M., on the day of in every year during the continuance of this policy, *does insure* the life of in the amount of dollars, for the term of life, *payable* to, his executors, administrators or assigns, at its office in the City of, upon due and satisfactory proof of interest and of the death of the said insured, deducting therefrom all indebtedness of the party to the company, together with the balance, if any, of the then current year's premium.

Provided, that in case the said premiums shall not be paid on or before the several days hereinbefore mentioned for the payment thereof, at the office of the company in the City of, or to agents when they produce receipts signed by the President or Treasurer, then, and in every such case, this policy shall cease and determine, subject to the provisions of the company's NON-FORFEITURE SYSTEM *as indorsed hereon, with accompanying table.*

This policy does not take effect until the first premium shall have been actually paid; nor are agents authorized to make, alter or discharge this or any other contract in relation to the matter of this insurance, or to waive any forfeiture hereof, or to grant permits, or to receive for the cash due for premiums anything but cash. Any error made in understating the age of the insured will be adjusted by paying such amount as the premiums paid would purchase at the table rate.

No assignment of this policy shall take effect until written notice thereof shall be given to the company.

This policy, after two years, will be INCONTESTABLE, except for fraud or non-payment of premium.

IN WITNESS WHEREOF, the said *Life Insurance Company* has, by its President and Secretary, signed and delivered this contract, at the City of, this day of, one thousand eight hundred and

....., *Secretary.*

....., *President.*

NON-FORFEITURE PROVISIONS.

WHEN AFTER TWO FULL ANNUAL PREMIUMS shall have been paid on this policy it shall cease or become void solely by the non-payment of any premium when due, its entire net reserve by the American Experience Mortality and interest at four per cent. yearly, less any indebtedness to the company on this policy, shall be applied by the company as a single premium at the company's rates published and in force at this date, either, *first*, to the purchase of non-participating term insurance for the full amount insured by this policy, or, *second*, upon the written application by the owner of this policy and the surrender thereof to the company at within three months from such non-payment of premium, to the purchase of a non-participating paid-up policy payable at the time this policy would be pay-

able if continued in force. Both kinds of insurance aforesaid will be subject to the same conditions, except as to payment of premiums, as those of this policy. No part, however, of such term insurance shall be due or payable unless satisfactory proofs of death be furnished to the company within one year after death; and if death shall occur within three years after such non-payment of premium, and during such term of insurance, there shall be deducted from the amount payable the sum of all the premiums that would have become due on this policy if it had continued in force.

The following table shows the amount that the company agrees to loan (being one-half of the reserve) upon a satisfactory assignment of the policy as collateral security; also the additional time for which the insurance will be continued in full force after lapse by non-payment of premium; or the value of the policy in paid-up insurance upon surrender within three months from date of lapse.

The figures given are based upon the assumption that the premiums (less current dividends) have been fully paid in cash. If there be any indebtedness upon the policy, the values as stated in the table would have to be reduced proportionally upon the principles stated in the policy. The indebtedness, if any, may be paid off in cash, in which case the figures in the table will apply:

Number of Years' Premiums Paid.	Company will Loan.	IN CASE OF LAPSE OF POLICY.		
		Extended Insurance.		Paid-up Policy.
		Years.	Days.	
.....	\$.....	\$.....
.....

XIII.

A Form of Policy of Accident Insurance.

The Insurance Company, in consideration of the warranties in the application for this policy and of dollars, does hereby insure under classification (being a by occupation) for the term of months from noon of, 189., in the sum of dollars per week against loss of time not exceeding consecutive weeks, resulting from bodily injuries effected during the term of this insurance, through external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occu-

pation above stated. Or if loss by severance of one entire hand or foot results from such injuries alone within ninety days, will pay insured one-third the principal sum herein named, in lieu of said weekly indemnity, and on such payment this policy shall cease and be surrendered to said company, or in event of loss by severance of two entire hands or feet, or one entire hand and one entire foot, or loss of entire sight of both eyes, solely through injuries aforesaid within ninety days, will pay insured the full principal sum aforesaid, provided he survives said ninety days. Or if death results from such injuries alone within ninety days, will pay dollars to if surviving; in event of his prior death, to the legal representatives or assigns of insured, provided—

1. If insured is injured in any occupation or exposure classed by this company as more hazardous than that here given, his insurance shall be only for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard.

2. This policy shall not take effect unless the premium is paid previous to any accident under which claim is made; and the company may cancel it at any time by refunding said premium, less a pro rata share for the time it has been in force.

3. The company's total liability hereon in any policy year shall not exceed the principal sum hereby insured; therefore, in case of claim for full principal sum, any sums paid as indemnity within such policy year shall be deducted therefrom.

4. Immediate written notice, with full particulars and full name and address of insured, is to be given said company at of any accident and injury for which claim is made. Unless affirmative proof of death, loss of limb or sight, or duration of disability, and of their being the proximate result of external, violent and accidental means, is so furnished within seven months from time of such accident, all claims based thereon shall be forfeited to the company. No legal proceedings for recovery hereunder shall be brought within three months after receipt of proof at this office, nor at all, unless begun within one year from date of alleged accident.

5. This insurance does not cover disappearances; nor suicide, sane or insane; nor injuries of which there is no visible mark on the body (the body itself in case of death not being deemed such mark); nor accident, nor death, nor loss of limb or sight, nor disability, resulting wholly or partly, directly or indirectly from any of the following causes, or while so engaged or affected: Disease or bodily infirmity, hernia, fits, vertigo, sleep-walking; medical or surgical treatment, except amputations necessitated solely by injuries and made within ninety days after accident; intoxication or narcotics; voluntary or involuntary taking of poison or contact with poisonous substances or inhaling of any gas or vapor; sunstroke or freezing; dueling or fighting, war or riot; intentional injuries (inflicted by the insured or any other person); voluntary over-exertion; violating law; violating rules of a corporation; voluntary exposure to unnecessary danger; expeditions into wild or uncivilized countries; entering or trying

to enter or leave a moving conveyance using steam as a motive power (except cable cars), riding in or on any such conveyance not provided for transportation of passengers, walking or being on a railway bridge or road-bed (railway employees excepted).

6. No claim shall be valid in excess of \$10,000 with \$50 weekly indemnity under accident policies, nor for indemnity in excess of money value of insured's time. All premiums paid for such excess shall be returned, on demand, to insured or his legal representative.

7. Any medical adviser of the company shall be allowed, as often as he requires, to examine the person or body of insured in respect to alleged injury or cause of death.

8. Any claim hereunder shall be subject to proof of interest. A copy of any assignment shall be given within thirty days to the company, which shall not be responsible for its validity. The company may cancel this policy at any time by refunding the unearned premium thereon. No agent has power to waive any condition of this policy.

In witness whereof, etc.

XIV.

A Form of Policy of Marine Insurance Cargo.

By the Insurance Company. on account of
In case of loss, to be paid in funds current in the United States, or in the City of New York, to, do make insurance, and cause to be insured, lost or not lost, at and from upon laden or to be laden on board the good, whereof is master for this present voyage, or whoever else shall go for master in said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

BEGINNING the adventure upon the said goods and merchandises, from and immediately following the loading thereof on board of the said vessel, at as aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at as aforesaid. AND it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance. The said goods and merchandises, hereby insured, are valued (premium included) at dollars.

TOUCHING the adventures and perils which the said Insurance Company is contented to bear, and takes upon itself in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detrainments of all kings, princes or people, of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof. AND in case of any

loss or misfortune, it shall be lawful and necessary to and for the assured, his factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof the said Insurance Company will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance, by the assured, or his assigns, at and after the rate of per cent.

AND in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the said (the amount of the note given for the premium, if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to *five per cent.* *Provided always,* and it is hereby further agreed, That if the said assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said Insurance Company shall return premium upon so much of the sum by them assured, as they shall be by such prior assurance exonerated from. AND in case of any assurance upon the said premises, subsequent in day of date to this policy, the said Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other assurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said Insurance Company shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous assurance. IT IS ALSO AGREED, that the property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade or any trade in articles contraband of war.

Warranted not to abandon in case of capture, seizure, or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to this company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade, but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.

IN WITNESS WHEREOF, the President or Vice-President of the said Insurance Company hath hereunto subscribed his name, and the sum insured, and caused the same to be attested by their Secretary, in, the day of, 189..

MEMORANDUM. It is also agreed, that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wicker-ware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under *twenty per cent.* unless general; and sugar, flax, flax-seed and bread, are warranted by the assured free from average under *seven per cent.* unless general; and coffee, in bags or bulk, pepper in bags or bulk, and rice, free from average under *ten per cent* unless general.

Warranted by the insured free from damage or injury, from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged and not otherwise, and the same practice shall obtain as to all other merchandise as far as practicable. Not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have been begun and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

In all cases of return of premium, in whole or in part, *one-half per cent.* upon the sum insured is to be retained by the assurers.

\$....., dollars.

....., *Secretary.*

....., *President.*

XV.

A Form of Collision Clause.

And it is further agreed, that if the vessel hereby insured shall come in collision with another vessel, and the assured become liable to pay, and shall pay, any sum or sums for damages resulting therefrom to said other vessel, her freight or her cargo, in such case this company will contribute towards the payment of three-fourths part of the total amount of said damages, in the proportion that the sum insured under this policy bears to the total valuation of the vessel as stated herein, provided, that this company shall not in any event be held liable under this agreement for a greater sum than three-fourths part of the amount insured under this policy.

And it is also agreed that this insurance company will bear a like propor-

tionate share of any costs and expenses that may be incurred in contesting the liability resulting from said collision, provided, the written consent of the company to such contest be first obtained.

But under no circumstances shall this company be held liable for any contribution in respect of any sum that the insured may be held liable to pay by reason of loss of life or personal injury to individuals from any cause whatsoever, nor for any claim for demurrage or loss of the use of any vessel, nor for wages or provisions or expenses of master, officers or crews.

It is further agreed to, that in no event shall this insurance company be liable under this policy for more than the sum insured in any case, either for claims for loss and damage ^{and}_{or} charges to hull of the vessel hereby insured ^{and}_{or} for claims of any and all kinds arising under this collision clause, or the policy to which it is attached, and all payments made under this policy shall reduce this policy by the amounts so paid, unless restored by a new premium.

[illegible]

KF 1164 R51

Author

Richards, George

Title A treatise on the law of
insurance, fire, life, ...

Borrower's Name

